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AN EDITORIAL

ARBITRATION, as a recognized field of study and knowledge, was greatly encouraged on March 23, 1954 when the American Arbitration Association opened the Lucius Eastman Arbitration Library and announced publication of its first bibliography. The library will be available to members of the Association at all times and to non-members by appointment.

The assembling, classifying and listing of all available books, pamphlets, articles and unpublished manuscripts on arbitration was a task long overdue, for development of resources for the study of arbitration had lagged behind actual practice of arbitration in labor-management, commercial and international trade relations. The rapid growth of arbitration has frequently been marked by inadequate understanding of the process and has at times led to uncertainty and confusion with respect to the scope of arbitration and its proper sphere of operation. Practitioners of arbitration, turning to general libraries and schools for research and answers to specific problems, found those institutions ill-equipped and inadequately supplied with the basic material in the field. Furthermore, it was observed that neither the Library of Congress nor the Dewey Decimal System of library classification provided a suitable way of classifying the large volume of published material on arbitration.

The first task was to devise a means of classifying and indexing upwards of a thousand titles in the Eastman Arbitration Library in such a way as to be most useful to those who practice arbitration. This was done under the direction of a library specialist from Columbia University, assisted by several librarians and the staff of the Association. Titles were divided into seven major groups: 1) Arbitration in General; 2) Labor Arbitration; 3) Compulsory Arbitration; 4) Commercial Arbitration; 5) International Commercial Arbitration; 6) Arbitration by Country, excepting the United States; and 7) International Political Arbitration. It will be seen that this listing does not include subjects such as negotiations and mediation which, while affecting arbitration, cannot properly be regarded as fully synonymous with it. To have included such more or less distantly re-

(*Continued on Page* 64)

AMONG OUR CONTRIBUTORS

PROFESSOR ARTHUR LENHOFF of Buffalo Law School discusses a matter of concern to most thoughtful observers of the labor-management scene. Definition of the rights of individual workers who are subject to collective bargaining agreements, yet not themselves individual parties to them, has been the subject of numerous court cases of extreme complexity. His thoroughly annotated article *The Effect of Labor Arbitration Clauses Upon the Individual* is an important document in law and philosophy as well as in labor relations. Professor Lenhoff formerly taught at the University of Vienna. He contributed all the sections on comparative law in the comprehensive volume, "Labor Relations and the Law," edited by Robert E. Matthews.

The appointment of JAMES P. MITCHELL as Secretary of Labor last year met with general approval in labor-management circles and his popularity has not diminished during his months in office. On March 6, Mr. Mitchell received the honorary degree of Doctor of Laws at Fordham University for "distinguished contribution to better understanding between labor and industry. . . ." The occasion was a labor-management arbitration conference, co-sponsored by the American Arbitration Association. It was at a similar conference at the University of Southern California that the Secretary of Labor delivered the address reprinted in this issue of *Arbitration Journal.*

F. HODGE O'NEAL is a member of the Louisiana Bar and Dean and Professor of Law at Mercer University's School of Law. He is co-author (with Kurt F. Pantzer) of *The Drafting of Corporate Charters and By-Laws,* a handbook prepared for the Committee on Continuing Legal Education of the American Law Institute. Dean O'Neal's article on *Drafting Arbitration Clauses for Disputes in Closely-Held Corporations* will be of interest to the many lawyers who are active in this growing field of arbitration.

WATT H. MCBRAYER, an attorney, represents the Cities Service Oil Company in bargaining with labor unions in Oklahoma. In discussing *What is Expected of an Arbitrator* Mr. McBrayer expresses in lucid terms an opinion often voiced in management circles to the effect that arbitrators sometimes tend to exceed their authority. Others may differ with Mr. McBrayer, but all will agree that we need better understanding of arbitration.

MORRIS S. ROSENTHAL, Chairman of the Executive Committee of the American Arbitration Association, toured Europe during the summer of 1953 and participated in the Fourteenth Congress of the International Chamber of Commerce in Vienna. The address he delivered before the Economic and Social Council of the United Nations, reprinted in this issue, resulted in a unanimous decision to consider, as a basis for future discussion and action, a proposed plan of the International Chamber of Commerce for making international trade arbitration awards enforceable.

Bus. Adm.

THE EFFECT OF LABOR ARBITRATION CLAUSES UPON THE INDIVIDUAL

Arthur Lenhoff

Bad law dies hard, and here much harder than in countries where *stare decisis* does not rule. In this country as well as in the industrialized countries of Europe, collective contracts have control over most of the individual employment relationships in industry and business. True, the collective contract imposes obligations upon the contracting parties, *viz.* employers and labor unions, and in this regard it is not different from any other contract. However, its function is not limited to this role. The collective contract is also the primary medium through which in our time government, *viz.*, the legislature, prescribes the terms upon which human labor shall be used. Abroad, this dual character of the collective contract has been recognized ever since legislation has granted supremacy to the contractual work schedules, wages, and other terms regulating the contents of individual employment relationships over terms particularly stipulated between the employer and an individual employee.

I.

A decade ago, the Supreme Court in the *Case*[1] and in the *Railroad Telegraphers*[2] decisions has clearly recognized that the National Labor Relations Act and the National Railway Labor Act have declared the terms for work fixed by collective contracts between an employer and the majority representative of the employees to be the terms for *all* employments within the bargaining unit or the occupational field, thus replacing non-conforming terms of individual contracts, past or future.[3] However, it is a lamentable fact that many courts still make vain efforts, as they did in the pre-

1. J. I. Case Co. v. NLRB, 321 U.S. 322 (1944).
2. Order of Railroad Telegraphers v. Railway Express Co., 321 U.S. 342 (1944).
3. See *Labor Relations and the Law,* 309 (ed. by Mathews et al. 1953).

statutory era, to force a new social phenomenon into concepts borrowed from the traditional law which controls private transactions.[4] In this vein, they have held that an individual employee is a third-party beneficiary in the contract structure, or even the principal therein, and the union only his agent. The approaches are, as one sees, contradictory, and contribute largely to the confusion concerning important problems of performance of labor-management agreements, and in particular the problems of labor arbitration. The problems turn upon the following principal questions.

First: Is an individual employee a party to the arbitration clause? Such a clause has been included in more than 91% of the 75,000 or more collective contracts currently in operation in this country[5] and affecting more than five and a half million employees.[6] Several related topics will be discussed in connection with this principal question.

Second: Is an award rendered in an arbitration, participated in by a labor organization as representative of the individuals, binding upon the individual? Depending upon the answer, various other issues will call for a discussion.

II.

At common law agreements to arbitrate are not enforceable. This principle has been changed by legislation; but on the one hand many states lack such a legislation, and on the other hand even the Federal Arbitration Act and various state acts exclude labor disputes from the scope of their regulations.[7] However, New York—a state

4. Rice, Collective Labor Agreements in American Law, 44 Harv. L. Rev. 572, 595 (1931); Lenhoff, The Present Status of Collective Contracts in the American Legal System, 39 Mich. L. Rev. 1109, 1110, 1145 (1941). See also Chamberlain, Collective Bargaining and the Concept of Contract, 48 Columbia L. Rev. 829, 834 (1948).
5. *Labor Relations and the Law*, VIII cited *supra*, note 3.
6. Bureau of Labor Statistics for 1952, cited in P. Seitz, Enforcement of Collective Bargaining Contracts, N.Y.U. 6th Conference on Labor 15, 17 (1953).
7. As for the Federal Act see Am. Ass'n of Street etc. Employees v. Pa. Greyhound Lines, 192 F. 2nd 310 (Cir. 3, 1951); International Union United Furniture Workers v. Colonial Hardwood Flooring Co., 168 F. 2nd 33 (1948); Donahue v. Susquehanna Collieries, 160 F. 2nd 661 (Cir. 3, 1947) [In contrast to Tenney Engineering, Inc. v. United Electrical Workers Local 437, 207 F. 2nd 450 (Cir. 3, 1953) and Donahue v. Susquehanna Collieries Co. 138 F. 2nd 3 (Cir. 3, 1943). See also Kochery, The Enforcement of Arbitration Agreements in the Federal Courts: Erie v. Tompkins, 39 Cornell L. Q. 74 ff. (1953)]. As for State acts (Ohio, Wisc., R.I. etc.) see Lenhoff, loc. cit. 1113, 1114 (note 15) and Local 1111 v. Allen Bradley Co. 250 Wisc. 609, 49 N.W. 2nd 720 (1951); Utility Workers' Union v. Ohio Power Co. 49 Ohio, pp 619, 77 N.E. 2nd 629, (1947). See also Sturges, *Cases on Arbitration Law* 47 (1953).

which has been the champion for statutory regulation of arbitration—is one of the few states which expressly extends its provisions to "controversies" arising between "the parties to a written (collective) contract including but not restricted to controversies dealing with rates of pay, wages, hours . . . or other terms and conditions of employment of any employee or employees. . . ."[8] This explains why the statutory and decisional material with which a discussion on the above questions has to deal has largely been supplied by New York courts. The wording of the statute demonstrates that the parties to the written contract, *viz.*, "employer or employers or association or group of employers" and "a labor organization" are regarded by this legislation also as the parties to the "controversy and controversies" which according to the provision in the contract are "to be settled by arbitration." According to the words and meaning of the statute, it does not matter that a controversy concerns matters related to individual employment relationships. This is in complete accord with the legal nature of a collective contract as such. Such a contract does not create employment relationships, but presents a standard form which the parties are obligated to make effective with regard to individual employment relationships, whether already existent or coming into existence later. The obligation of the employer to comply with the contract standard and to abstain from departing therefrom in individual agreements is in no less degree contractual than that of the union to take all measures available to it, disciplinary ones included, to compel the observance of the standard by its members. Vice versa, the counterpart of the employer's contractual obligation is the union's contractual right to compel the performance of this obligation. In addition to provisions regulating the terms of individual employment relationships a collective bargaining contract contains other provisions which do not constitute the contents of individual employment relationships, but are the concern of the parties to the contract, such as a union security clause, a grievance machinery, and arbitration. Terms of the latter class can and shall be directly performed not only by the employer, but also by the union.

The important conclusion to which this analysis leads is that a union's rights originating in a collective contract are not identical with those rights which arise out of the individual employment relationship. For example, an individual employee, member or nonmember, has a right to the payment of the standard wages to himself; whereas the union has a right to insist upon the payment of

8. N.Y., CPA, Section 1448 (1).

such wages to the employee.[8a] An employee's interests are individual, and his duties are based on legal norms created by the common law, statutes, and collective-contracts standards. The union seeks to secure a variety of group interests, and the collective contract is the instrument used for this purpose. A third-party beneficiary can release the promisor from the duty to perform the promise towards him and by such a disclaimer render the duty of the former inoperative. One of the many difficulties in viewing an individual employee as a third-party beneficiary lies in the now generally accepted rule than an employee has not that power given to a third-party beneficiary, to depart by individual agreement from the standard terms set up in the collective contract.[9] Other interesting corollaries to the perplexing dilemmas to which the third-party beneficiary misconstruction leads will be presented later.

Since, with respect to the collective contract, an employee is neither a promisee nor a third-party beneficiary, he is not entitled to invoke the arbitration clause therein, even if he were a member of the contracting union, and even if that clause did belong to the provisions regulating individual employments—which it does not. The consequences of a denial of such a right have been recently drawn by the Court of Appeals in New York, in *Hudak v. Hornell Industries.*[10] The court, although misconceiving the plaintiff employees as third-

8a. The excellent approach of the most recent decision *Association of Employees v. Westinghouse Corp.*, 33 LRRM 2462 (Cir. 3, 1954) to collective contracts is slightly blurred by its denial to the union to establish in proper equity proceeding the contractual duty of the employer to comply with the wage schedules of the contract. For the fact that such a right is recognized in other countries, see my discussion in *Labor Relations and the Law* (Rob. Mathews ed. 1953) 443 ff.

9. It is perhaps partly due to the contradictory approach in Case v. NLRB, 321 U.S. 332 (1944) that writers of judicial opinions in state courts confuse the position of an employee with that of such a beneficiary. Compare: "The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits." (p. 336 line 7-13) and "the very purpose of providing *by statute* for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group" (p. 338 line 5-10), *with* "an employee becomes entitled *by virtue of the Labor Relations Act* somewhat as a third party beneficiary to all benefits of the collective trade agreements" (p. 336, line 3-6) [emphasis added]. The italicized words show that the Court used a simile rather than a concept in this last sentence; for the status of a third-party beneficiary to a contract can never be created by a statute. Nevertheless, writers of judicial opinions in New York and elsewhere having plunged in this grave conceptual error in the pre-Case era (See Gulla v. Barton, 164 App. Div. 293 (1924) have tenaciously adhered to it afterwards. See, eg., Hudak v. Hornell Industries, 304 NY 207, 214 (1952). See also in re Norwalk T. & R. Co., 100 F. Supp. 706 (D. Conn. 1951) and Adams v. Rep. Steel Co., 254 Ala. 620, 49 So. 2nd 214 (1950).

10. 304 NY 207 (1952).

party beneficiaries, proceeded correctly upon the concept that contractual arbitration is available only to the parties to the (collective) contract. It is one thing to hold that the union may vindicate before an arbitration board the fulfillment by the employer of the standard set up in the contract for individual employment relationships, since it is the union's right so to proceed. It is a completely different question whether an individual employee, the union staying aloof from such a proceeding, may rightfully make a demand for arbitration of his claim—for example, a claim for damages for a discharge contrary to the contract terms. The answer given to this question in *Julius Wile Sons*[11] may be sound, but its basis is open to challenge. There the Board of Mediation (which was to be the arbitrator according to the collective contract) had resolved all doubts about the plaintiff-employee's petition for an arbitration proceeding concerning his claim against the employer by holding that only the union, being a party to the collective contract, has a right to make such a petition. The Board suggested that petitioner request the union to arbitrate the case. When his request was rebuffed by the union (he was a non-member), and a judicial action was brought by him against the company, the court said: "He is entitled to have his claim against the employer heard and determined either by arbitration or by judicial action. If the petitioner (i.e., the employer having previously obtained a stay order from the court) stands on its right to have the dispute arbitrated because the collective bargaining agreement so provides, that *right may be accorded* to the petitioner, despite the union's refusal to represent the respondent (i.e., the employee) in the arbitration. . . . If the petitioner is unwilling to proceed to arbitration as herein indicated, the stay will be vacated and the respondent will be permitted to proceed with the action." It is obvious that the court clearly failed to recognize that the employer has, as against the employee, "no right to stand on" concerning arbitration. His right to have a controversy arbitrated must have the union as opponent. Furthermore, the court uses words indicating its power to "accord" an employee a right to arbitrate where, as the court implied, there was no such a right.

By contrast, the learned arbitrator *in re General Cable Corp. v. Vaccaro*[12] regarded arbitration as a usual method of adjusting grievances. Since an employee has a right to present grievances inde-

11. 199 Misc. 654, 102 NYS 2nd 862 (1951).
12. In re General Cable Corp. v. William Vaccaro, 20 Lab. Arb. Rep. 443 (1953).

pendent of the union, it is only logical to construe an arbitration clause of a collective contract as the basis for an independent right of an employee to demand arbitration, even though the contracting party, viz., the union, as in the instant case, objected against the initiation of an arbitration procedure for his claim. The arbitrator proceeded in spite of the union's protest. He took the view that in the absence of a promise made to the union by the employer in the collective contract that he will refuse to arbitrate with an individual employee, no right of the union is being violated by this independent procedure.

The intention of both decisions is good, but the former is self-contradictory, by affirming and denying at the same time the individual's right to arbitration. The latter, admitting that it is not free of doubt, cannot explain that a person who is not a party to an arbitration clause could invoke it, particularly if the two parties to the contract resisted arbitration. The *Vaccaro* award will be dealt with later. Both decisions demonstrate the high grade of confusion in matters of labor arbitration.

A court cannot accord anyone a right to have his claims arbitrated since a free agreement between the parties is a *conditio sine qua non* for an arbitration. The Supreme Court of New York reached in *Bianculli v. Brooklyn Union Gas Company,*[12a] a "wrongful-discharge" case, a correct result on the basis of a highly debatable reasoning. The employee's demand for an order directing his union to have the wrongfulness of his discharge determined through arbitration was denied. The court held that there is "no independent right of an employee either to compel the union to institute arbitration proceedings or to require the company to submit to arbitration without regard to the union." However, one has to recognize that the question of the right of an employee to bring his claim in cases like the three last mentioned ones before a court, is a different matter.

Thus, while on the one hand, an employee cannot (being an outsider) in the absence of the union, be the party raising a claim against his employer before an arbitration tribunal provided for in the collective contract,[12b] on the other hand, he has no standing to prevent

12a. 115 N.Y.S. 2d. 715 (1952).

12b. In Sholgen v. Lipsett, Inc., et al. 116 N.Y.S. 2d. 165 (1952) the court denied an employee the right to use the arbitration clause against the employer although the union had declared to have no objection to the employee's arbitration. To the same effect: Guggenheim v. Paragon Paint & Varnish Corp. 119 N.Y.S. 2d. 493 (1953).

the union from arbitrating his claim[13] or to petition the court to deny the confirmation of an award rendered in the union-company arbitration.[14]

III.

Under the assumption that an arbitration clause pursuant to the New York Arbitration Statute[15] cannot directly be used by or against an employee, the New York court held in the *Hudak* case[16] that the plaintiff's employees may assert rights arising out of their employment terms in a judicial action against the employer. The labor relations statutes authorize the majority representative to enter into collective contracts "in respect to rates of pay, wages, hours of employment or other conditions of employment" for the whole unit, including members as well as non-members of the representing union. These terms present legal norms for the individual employment relationship because they are imposed upon it by statutory command, and not by an act of volition, such as consent and agreement, and are therefore not subject to any modification by such acts of volition. Accordingly, it cannot be the collective agreement which produces this effect, quite apart from the consideration that it is only the striking command of those statutes which permits the employment relationship of non-members of the contracting labor union to be ruled by a transaction of strangers. Therefore, viewed under the aspect of the *statutory* basis on which the contract rests—a statutory contract, properly called—the ordinary-contract notion dissipates. Thus, one has to keep in mind that the basis of the rights of an employee is not the collective contract, but the collective contract *statute* which by reference incorporates the employment terms fixed in the former.[17]

If a member of the unit subject to a collective contract, based upon the statutory authority of the representative, were a third-party

13. Miller & Sons v. United Office etc. Workers, Local 210, 88 N.Y.S. 2nd 573 (1949), rejecting the opposite approach of Bush Jewelry v. United Retail Employees, Local 830, 120 Misc. 482 (1938).
14. In re Spottswood, 88 NYS 2nd 572 (1949).
15. CPA art. 84.
16. Hudak v. Hornell Industries, see note 10 *supra*.
17. Lenhoff loc. cit. 1137, and in *Comments, Cases and other Materials on Legislation* 7 (1949). Furthermore, in *Labor Relations and the Law* 276, 310, cited *supra* note 3; Summers, Judicial Review of Labor Arbitration, 2 Buffalo L. Rev. 1, 24 (1952). This approach to the legal basis of the individual employee's rights to wages, hours, etc., as established by the standards set up in the controlling collective contract, can now be found in *Association of Employees v. Westinghouse Corp.*, 33 LRRM 2462 (Cir. 3, 1954).

beneficiary only, his rights would be entirely derived from the agreement and subject to all its limitations, even including its modification brought about by an understanding between promisor and promisee.[18] But by following the rationale as espoused by the Supreme Court, a member of a unit, subject to a "statutory collective contract," asserts rights regulated by statute which in defining their contents refers to terms agreed upon in a collective contract. Recognizing the difference, one may marvel why attorneys for individual employees still greatly impair the chances for their clients by presenting them as third-party beneficiaries. It is not difficult to see the close connection between the question of the legal status of the individual and the question of whether an employee could be deprived, by the arbitration clause of the contract, of the vindication of rights which are not subject to parties' disposition.[19] Before attempting to answer this difficult question,[20] it might be helpful to cast a glance at the usual formulations providing for arbitration.

At the outset, one has to distinguish this question from the problem of the arbitrability of a dispute. This problem may, for example, arise where the question of the discharge of an employee turns upon his union activities as its cause. In such a case, the administrative agency has exclusive jurisdiction.[21] However, New York courts have frequently confused the substantive question of an apparent lack of foundation for a claim with the procedural one of arbitrators' jurisdiction and have answered the latter in the negative, but only upon reasons derived from a negative answer to the former.[22] Reversing a decision of the Appellate Division which took such a position, the Court of Appeals, in *Bohlinger v. National Cash Register*,[23] recently took the lead in the right direction. There, words of the contract had placed no restriction "on the inherent right of the employer to discharge an employee with or without cause," but a general provision for arbitration of "any dispute and as to any matter" was in-

18. Hartman v. Pistorius 248 Ill. 569 (1911); Gifford v. Corrigan, 117 NY 257 (1889); Arnold v. Nichols, 64 NY 117 (1876).
19. Lenhoff, Optional Terms (Ius Dispositivum) and Required Terms (ius cogens) in the Law of Contracts, 45 Mich. L. Rev. 39, 55 ff. (1945).
20. The above remarks about the failure of a party to recognize the existence of a problem holds even more true with respect to this question. See, e.g., employee overlooking this angle in Buffalo Courier Express v. Dyviniak 124 NYS 2nd 249 (1953).
21. Labor Management Relations Act, 1947 Section 10 (a); see also the cases in Book Review, 46 Col. L. Rev. 892 ff. (1946). Furthermore NLRB v. International Union, UAW, CIO, 19 F. 2nd 698 (1952).
22. This is excellently demonstrated by Summers, 14 ff. 21 loc. cit. note 17 *supra*.
23. 305 NY 539, (1953) (4:2, Desmond and Dye, J. J. diss.).

serted. By such a broadly-phrased clause, the contracting parties intended, to all appearances, to authorize the arbitrators to clear up differences between the parties to the contract as promptly as possible, even though the contract did not contain an express provision on the matter over which the dispute had arisen.[24] One can hardly say in such a situation that the dispute concerns a specific right of an individual. Naturally, if the union wins, the result may be beneficial to him. But a contrary result, although it may disappoint him, will not supply a good basis for a complaint on his part since the dispute did not turn upon specifically defined individual rights.

Prior to the enactment of arbitration statutes, enforceability of certain clauses was frequently, particularly in England,[25] achieved by construing them not as arbitration agreements but as a condition precedent to an action on the contract. In this regard, those clauses which provide only for the ascertainment of one or several facts by third persons, for instance, the extent of a loss in connection with an insurance claim, or a valuation of property or the fair rental value for the purpose of an optional clause in a lease, or the acceptance of a building by an architect, have been distinguished from agreements providing for the submission of the entire question of liability to arbitrators. The former were regarded as indirectly enforceable upon the condition-precedent doctrine, while the latter were denied enforceability.

Now, in jurisdictions which have an arbitration statute similar to that of New York, the distinction has lost its *raison d'être*. On the one hand, arbitration agreements which comply with the statutory requirement are enforceable. On the other, an amendment of the New York Arbitration Statute, 1941,[26] requires "valuations, appraisals or other controversies which may be collateral, incidental, *precedent* or subsequent to any issue between the parties" to be treated "as arbitration proceedings." Accordingly, even if the agreement provided for arbitration of a single question such as the extent of the seniority of an employee or the existence of a just and proper cause for the discharge of an employee, it would fall within the scope of the arbitration statute.[27]

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24. See, e.g., in re N.J. Worsted Mills, 110 L.A. 310 (1948); United Electrical, Radio, and Machine Workers, 134 N.J.L. 349, 48 A. 2nd 295 (1946). Contra: in re Textron Ink 12 L.A. 475 (1949).
25. The classic case is Scott v. Avery, 5 H. L. Cas. 811 (1856). But see also Dworkin v. Caledonian Ins. Co., 285 Mo. 342, 226 S.W. 846 (1920).
26. Laws (NY) 1941, c. 288 adding a new paragraph (2) to § 1448 CPA.
27. See, e.g., m. of Fitzgerald, 275 App. Div. 453 (1949).

It must be borne in mind that upon the statutory granting of enforceability and irrevocability to arbitration clauses the reason for construing one clause as an effective condition precedent and the other as a revocable submission to arbitrate has no longer any significance, for the argument (if it ever had a basis), that the right to go to the courts for the enforcement of a disputed claim must not be given away can no longer be made as against the latter clause. Concerning the former clause, it continues to fulfill its function of directing a factual prerequisite for a claim such as the existence of a proper cause for a discharge of an employee to be determined in an extra-judicial way.[28] Thus, the only question calling for a discussion may be formulated as follows: Does the labor legislation, creating "unwaivable" rights based on specific employment terms established by "statutory" contracts, require that all these rights be unconditional?

It is obvious that the freedom of parties to a collective contract to fix those terms is bounded by limitations which public policy exacts. For example, payment of wages for work done must not be made dependent upon factors which are beyond the control of the employee. However, a different answer might be given where the term restricts—conditionally—the common law right of an employer to discharge his employees, and the condition consists of giving only the union the right to challenge the propriety of such a discharge upon the ground of the absence of a "just and proper cause." Placed upon the specific facts of the case, the decision reached by the Supreme Court of New York in *Bianculli v. Brooklyn Union Gas Company* seems to be correct, [29] although a more guarded language in the reasoning would have given it more force. Equally, in the matter of *Utility Laundry Service*,[30] a similar result was supported by the collective contract which specifically referred the question of complaints concerning negative covenants to arbitration. Neither are the decisions in the *Donato*[31] cases in conflict with the approach here taken, for it was not the propriety of the conditional character of the job security provision in the collective contract which was at issue; rather, it

28. The difference between the former construction of such a clause and the effect produced by the statutory amendment lies in the statutory guarantees for a correct procedure in an arbitration. See Sturges' apt comment op. cit. 99, to Syracuse Savings Bk. v. Yorkshire Ins. Co. 301 N.Y. 403 (1950).
29. 115 N.Y.S. 2d 715 (1952).
30. 300 N.Y. 255 (1949). The fact situation in Charman v. Pan Am. Airways, 188 F. 2nd 875 (Cir. 9, 1951) was similar.
31. 279 App. Div. 545 (1952) [first case] and . . . App. Div. . . . 127 N.Y.S. 2d 709 (1954) [second case].

was the loyalty of the union in the arbitration proceeding. This problem will presently be discussed. Finally, in the *Hudak* case, previously mentioned, the limitation placed upon employer's freedom to discharge four designated employees was not conditioned upon the union's raising of the issue. Accordingly, in the absence of a union's request for arbitration—individual employees being no parties to the arbitration clause, see *supra*—the Court of Appeals correctly held that they could prosecute their rights in the court.[32]

IV.

Now the discussion has reached the point at which the other cardinal question, that of the binding effect of an award rendered in a union-employer arbitration upon an individual, awaits an answer. American law lacks an institution like that of the European labor courts created by legislation and operated as a part of the judicial branch of government. Consequently, at present the only practical redress, if any, an American employee aggrieved in his employment rights can obtain is, as this writer stated in another study,[33] through the grievance procedure and perhaps through arbitration, both being steps which presuppose the existence of a collective contract. The fact cannot be disputed that in the absence of such a contractual machinery an employee, after a right asserted by him has accrued which was not honored by the employer, would have to resort to the common law courts, a very costly, sluggish, and cumbersome venture.

However, the problem considered here presupposes the existence of a collective contract which provides for arbitration (as nearly all such contracts do).[34] At the same time we have to take into account that an individual employee is, as it was previously demonstrated, no party to the arbitration. Furthermore, we may eliminate situations which, as it may be recalled, present conditional rights, the condition consisting of an ascertainment of a fact by a method denying the individual any part therein.

It is very easy to say, as one can read in some opinions, that an individual is barred from resorting to the courts because the collective contract contains an arbitration clause,[35] or because he "knew of the clause being a provision of the collective contract and that it

32. Hudak v. Hornell Industries 304 N.Y. 207 (1952). ["This was not a typical collective contract" said the Court of Appeals.]
33. *Labor Relations and the Law* (ed. Mathews) pp. 66, 70, 84.
34. See, *ante*, footnote 6.
35. To this effect: Ott v. Metropolitan Jockey Club, 107 N.Y.S. 2d 845 (1951) [first instance]. But the decision was essentially modified in the second instance 282 App. Div. 721 (1953).

was made by the union in his behalf as one of its members; he knew his wages and other interests were served by the provisions of the collective contract. He became bound thereby."[36] One is not amazed that such a cobweb of language has little trouble in coming to the same result even if the claimant were a non-member. Thus, in matter of *Newspaper & Mail Deliverers' Union v. Newark News Dealers Supply,*[37] an award was held absolutely binding upon the petitioner who was a non-member, upon the ground that, although of course the contract was entered and signed by the union and not by the individual employees, "non-union employees are parties to the arbitration agreement."

It would be difficult to square the various reasonings of all the opinions quoted in the foregoing paragraph. At one moment they regard the signing union as the agent of its members and at another as a nobody, since every employee, even a non-member, is said to be the party to the arbitration agreement. Equally confused is the placing of a contractual employment term such as wages on the same level with regard to its binding effect on an individual as the arbitration clause. (As for this confusion, more will be said in section V, *infra*).

It is unnecessary to repeat what was said in the previous sections about the distinction made by the law between, on the one hand, the employment terms regulated by virtue of the statutory command with normative effect upon the individual employee, and, on the other hand, the purely contractual clauses such as a union security clause and an arbitration clause, which engage the contracting parties only.

Furthermore, in attempting to subordinate completely the individuals' rights to the union interest and policy, those opinions overlooked the fact that the same statute which has provided for the binding effect of the regulatory part of a statutory contract has also dealt with the question whether the union has the power to settle grievances of individual employees with conclusive effect upon them. In this regard the Labor-Management Act, 1947, contains one provision which the lawmaker allowed immediately to follow the other one which deals with the regulatory effect given the employment terms fixed in the contract. The arrangement of this sequence of provisions was by no means merely casual. Lest the former provision on the exclusive authority of the statutory representative of the union be construed as giving such a representative an all-embracing control

36. So reads the opinion in m. of Sperling 264 App. Div. 878 (1942). Similar Application of Chakrin, 97 N.Y.S. 2d 258 (1950).
37. See Sup. Ct. N.Y. 19 C.L. 66, 102, 124 N.Y. L.J. 1721 (1950).

over individual claims, the exclusive-representation principle has been carefully qualified by the addition of a proviso as follows: "*Provided,* that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. *Provided* further, That the bargaining representative has been given opportunity to be present at such adjustment."[38]

A provision somewhat similar to this proviso was contained in the National Labor Relations Act (Wagner Act), 1935. However, when in 1947 the new Labor Management Relations Bill was debated in the Senate Committee on Labor and Public Welfare, the formulation of the proviso was revised. The Committee Report is very clear on the meaning of the proviso. It stated its views, after having charged the Board with its failure to give full effect to the right of individual employees to present grievances,[39] in the following sentences:[40] "The revised language would make it clear that the employee's right to present grievances exists *independently* of the rights of the bargaining representative, if the bargaining representative has been given an opportunity to be present at the adjustment, unless the adjustment is contrary to the terms of the collective-bargaining agreement then in effect."

This legislation makes it perfectly clear that for an award to affect an employee's unconditional right, more must be shown than that an arbitration was had between union and employer.[41] Since the legislation clearly intended to secure the individual his—one would be tempted to say—natural right to present and settle his own claims for violation of an employment term,[42] the assumption that he cannot prosecute such claims because of the existence of an arbitration clause in the contract would border on the incredible.

An arbitration clause on which such an incredible gloss is placed is in no less conflict with that imperative provision of the Labor

38. Labor Management Relations Act, 1947, § 9 (a).
39. The Report explained the attitude of the Board with reference to Hughes Tool Co. v. N.L.R.B., 147 F. 2d 69 (Cir. 5, 1945) which the Board contrasted with NLRB v. North American Aviation Inc., 136 F. 2d 898 (Cir. 9, 1944).
40. Senate Report N. 105, Report of the Senate Committee, 80th Cong., 1st Sess. p. 24.
41. See the formulation in Elgin, Joliet and Eastern Railway v. Burley, 325 U.S. 711, 738 (1945).
42. At the least, such claims fall within the terms of "grievances". See Judge Learned Hand in Douds v. Local 1250, 173 F. 2d 764 (1949).

Management Act than the conflict found by the Supreme Court in the *Elgin* case,[43] with respect to the interpretation placed by the lower courts upon provisions of the Railway Labor Act.[44] Regarding the right of an employee to vindicate his individual rights, Congres was by far not so explicit in the formulation of the latter provisions than it was in that of the former.[45] There is good reason to assume that when the proviso of Section 9[46] was under consideration, the Senatorial Committee, redrafting it, did so with the *Elgin* decisions in mind.[47] In balancing the disadvantages which individual action might entail (with respect to the bargaining position of the union) against the dangers inherent in the complete submerging of the individual interests in collective policies, the Committee was not willing to place individual employees (a substantial part of which are non-members) under the tight guardianship of powerful unions.

V.

In holding that, as a matter of principle, an individual employee need not be deemed bound by a determination reached in an exclusive union-employer procedure concerning his rights,[48] one does not give an answer to two related questions. The first question points to a possible construction of the grievance and arbitration provisions of a collective contract as preliminary remedies, the exhaustion of which is a prerequisite to a subsequent judicial review. The other goes to the question of representation of an individual by the union by virtue of an authorization given voluntarily to the latter by the former.

Turning to the *first* question, one may come across a few decisions in which courts have sometimes given to it an affirmative answer. Thus, a Pennsylvania court discussing an action brought by employees who were members of the contracting union for payment of a wage difference, held that: "Courts must not entertain jurisdiction to review such grievances as are set forth until first plaintiffs avail themselves of the remedies afforded by the rules and regulations existing . . . unless it can be proven that untoward abuse, clear prejudice or some arbitrary or illegal conduct has perverted them

43. Elgin, Joliet and Eastern Railway Case, see *supra* note 41.
44. Railway Labor Act, 44 Stat. 577 (1926) (as am. 1934, 1936, 1940, and 1951) Sec. 3 *first* (i) (j).
45. Compare National Railway Labor Act sec. 2, *Second* and sec. 3 *First* (i); with National Labor Management Act, 1947 § 9 (a), proviso.
46. For the proviso see text preceding the reference to footnote 38 *supra.*
47. See the opinion in the Douds case, *supra* note 42.
48. In re Norwalk Tire and Rubber Co. 100 F. Supp. 706 (D. Conn. 1951) Miller & Sons v. United Office etc. Workers, 88 N.Y.S. 2d 273 (1949); in re Spottswood, 88 N.Y.S. 2d 572 (1949).

or made their exercise futile."[49] The court raised also, hypothetically, the question whether the lack of membership or termination of the relationship would affect the result. But without presenting a clear answer the court stated that the legal problems posed are "frequently difficult of solution."

It is evident that whether or not one accepts the exhaustion of union-arbitration rule, the rejection by the union of an employee's request to initiate a grievance procedure or, if this step remains unsuccessful, to proceed to arbitration, restores freedom of action to him.[50] The same result is arrived at in the case of a union's mere failure to react to the employee's request or of the union's harmful delay.[51] However, there is corroborative evidence for denying the existence of a rule which compels an employee, when his grievance is not settled, to await the union's completion of an arbitration procedure. Concerning the grievance stage, the statutory proviso of Section 9(a) L.M.R.A. argues against any construction which would prevent an employee from presenting his individual claim directly and immediately to the employer. He is not bound to the various steps of the grievance procedure as they are set up in the contract, and neither is the employer bound by them *vis-a-vis* him. Does the situation take on a different aspect at the moment when the grievance has ripened to a controversy calling for a determination by an outside authority, *viz.*, arbitrators or judges?

One can hardly find any trace for a policy requiring the exhaustion-of-union efforts in the statutory rule demanding the control of the wage and work schedules, as fixed in the collective contract, over all individual employments in the unit. This rule goes to substance. An inference that the rule has also a procedural aspect giving the union a primary right to handle an employee's claim is decisively refuted by a statute which contains the solemn proclamation of the principle that the individual employee's right to handle his grievance shall exist independently of whatever contractual rights the union might have against the employer with respect to such grievances.[52]

The fallacy in the exhaustion-of-arbitration argument stems from two sources. The one was discussed above. The error lies in the failure to distinguish between individual rights the substance of which is

49. Ilgenfritz v. Westinghouse Electric Corp., 16 L.A. 486 (1951). See also in re Atlantic Basin, 16 L.A. 51 (1951).
50. Hudak v. Hornell, 304 N.Y. 207 (1952); in re Norwalk Tire and Rubber Co., 100 F. Supp. 706 (1951). In re Julius Wile and Sons & Co., 199 Misc. 654, 102 N.Y.S. 2d 362 (1951).
51. See the situation in Donato v. Am. Locomotive Co., 279 App. Div. 545 (1952).
52. For the Committee Report, see note 40 *supra*.

formed by the cooperation of group representation with the employer, on the one hand, and, on the other, the method provided by the collective contract for the settlement of their differences, a procedural matter.[53] The other error has its origin in the tendency to labels or, if we may say so, to "symmetric conceptualism." The rule that a member of a labor union challenging the lawfulness of his expulsion or suspension cannot resort to the courts before he has first exhausted his union remedies, rests chiefly upon the consideration that by joining the union a member is subject to its internal rules. A propos, many courts do not even follow the rule where the question does not concern a merely internal affair, such as the restoration of membership, but goes to property or political rights claimed by the ex-member.[54] The latter questions have nothing to do with union policy; and union discipline and matters raising issues of "organization misconduct" (like the analogous problem of "professional misconduct") are better left to the appraisal of a man's peers.

The rule may be useful for the expulsion type of dispute, but its use in a dispute on wages or on a severance or vacation payment cannot be intelligently urged. The two mechanisms, grievance procedure and arbitration, are usually interconnected in a collective contract, and the latter will hardly be placed therein without the former. Being so interwoven, it seems obvious to conclude that the non-employment of the former closes the door to the latter; for, as an unbroken rule, the invocation of the latter by one party, is conditioned in the contract upon the failure to reach a settlement in the grievance procedure. Where the grievance procedure was not or not through all stages prosecuted, because the griever rejected union intervention, shall he nevertheless have to await a union arbitration before he can seek his rights at the hands of a court?[55] Such a demand appears to be meaningless. It would also be illogical to deny an individual employee the access to the courts while accepting as undeniable his right to handle his grievances independently. The alternative to such a demand is not, as Professor Hays as arbitrator in

53. See Kochery, *loc. cit. passim* who also concedes the procedural character of an arbitration contract in its enforcement aspect, however arguing against the current opinion for the substantive character to be ascribed to the rule of revocability.

54. See, e.g., Crossen v. Duffy, 90 Oh. App. 252, 103 N.E. 2d 769 (1951); Nissen v. I.B. Teamsters, 229 Iowa 1028, 295 N.W. 858 (1941); Smith v. International Printing Pressmens' Union, . . . Tex. Civ. App., . . . 190 S.W. 2d 769 (1945). See Annotation 168 A.L.R. 1462 for other cases.

55. See also *Labor Relations and the Law* 431, referring to the Norwalk case, note 50, *supra*. But see in re Atlantic Basin Iron Works, 16 L.A. 51 (1951), Ilgenfritz v. Westinghouse El. Corp., 16 L.A. 486 (1951).

the *Vaccaro* case[56] thought, the granting of a right to him to proceed to arbitration, since the proviso of §9(a) does not extend to it.

Two more remarks must be added. The statutory guaranty of an individual's "independent" right to take care of his grievances is grounded upon the recognition of the heterogeneity which exists between the organized policies of a union and the individual desires of an employee.[57] This diversity need not reach a degree of a conflict. The union might, for example, at the moment be much more interested in seeking the promise of a pension system at the forthcoming negotiation for a new contract for the maintenance workers than in the reinstatement of quarrelsome John Smith, discharged at the occasion of an insignificant difference with his foreman. Assume, for argument's sake, that, grievance settlement having failed, the union arbitrated Smith's case without success, and that Smith, advised of the primary-union-arbitration rule, awaited this event and then brought suit against the employer. The situation places before the court the following alternative, clearly indicated by the split in the courts on the question of the significance of the union-arbitration clause for the individual. On the one hand, there are those courts which, with respect to the arbitration clause, hold that an individual is, as a matter of principle, not a party to an arbitration agreed upon by others.[58] A judicial decision made in his favor demonstrates that the settlement or award in the union proceeding, ending with a denial of his claim, was unlawful, since all these claims rest on provisions which cannot be bargained away.[59]

On the other hand, those courts which follow the primary-arbitration rule will be very reluctant to review the decision of the arbitral tribunal at all; for the limitation of judicial review to objections against the award which are based upon questions concerning the impartiality of the tribunal, the compliance with procedural due process, or demands of natural justice, is inherent in the exhaustion-of-

56. This consideration is completely overlooked in the opinions such as Bianculli v. Brooklyn Union Gas Co., 115 NYS 2d 715 (1952); m. of Sperling 264 App. Div. 878 (1942); Newspaper & M. Deliverers v. Newark Newsdealers Supply, 19 L.C. 66102 (1950) (non-member!), Charman v. Pan-American Airlines, 188 F. 2d 875 (Cir. 9, 1951); m. of Mencher, 274 App. Div. 585 (1948). All these decisions considered an award reached without active participation of the individual in the proceedings, as binding on him.

57. Arbitration in m. of General Cable v. Vaccaro, 20 Lab. Arb. Rep. 443 (1953).

58. Application of Sun-Ray Cloak Co., 256 App. Div. 620 (1939).

59. In re Norwalk Tire and Rubber Co., 100 F. Supp. 706 (1951) [grievance settlement in favor of employer in negotiations with him by union]. See reasoning in Hudak v. Hornell Industries, 304 N.Y. 207 (1952).

remedy idea.[60] By following the idea as defined, one has to assume that in absence of those objections the submission by the union of the individual claim also subjects the holder of the claim to an award made on the merits.

By making this assumption the courts get themselves in great difficulties. They have to square the idea developed by them that the individual might have, after arbitration, his day (however restricted, see *supra*) in court, with the principle that an award, once rendered, can be set aside only upon the conditions and limitations defined by the arbitration statute. The recent decisions in *Donato v. American Locomotive Co.*[61] illustrate this dilemma very well. There, an award was rendered in favor of the employer in an arbitration carried on—without control by plaintiff—by a union challenging the existence of a good cause for plaintiff's discharge. Strangely enough, the arbitrators traced, in the award, their inability to reach "what a majority of the Panel felt was (sic!) an equitable decision for the plaintiff" to the union's conduct because of the length of time during which "it had permitted the case to languish." The arbitrators said that they felt that "the discharge was not merited." Subsequently, the union failed to apply in time[62] for an order vacating the award. Thus, the allegation in the complaint, thereafter brought, to the effect that the union had delayed prosecution, had some foundation.

Instead of conceptually divorcing, as it would have been proper, a union arbitration initiated and conducted by the union without any control on part of the employee, from a proceeding participated in by him, the entire court held him bound by the submission made by the union. But, on the other hand, the first case sought to counteract the conclusive effect of the extinction by statutory prescription of any challenge of the award, by saving to the unfortunate plaintiff a right in equity to have the award vacated. This was a construction which, as the second case held, certainly mutilated the recognized principle that the statutory remedy against awards is exclusive.

VI.

In most cases a union proceeds to arbitration for an individual claim upon the employee's request. Consequently, the action of the former will, as a rule, be regarded as binding on the latter. Before answering the question whether a different result might be reached

60. See Ilgenfritz v. Westinghouse El. Corp., 16 L.A. 486 (1951); Sunship E. Ass'n. v. Industrial Union of M & S Workers, 351 Pa. 84, 40 A 2d 413 (1944).
61. 279 App. Div. 545 (1952); and App. Div. 27 N.Y.S. 2d 709 (1954).
62. N.Y., CPA. §1462, §1463.

in cases of some arbitrary conduct or disloyalty on the part of the union and the like, it is necessary to take an analytical view of the effect of an award in a subsequent action concerning the claim which had been the subject matter of the arbitration proceeding.

In jurisdictions like New York which provide by statute for an entry of judgment upon the granting of an order confirming an award,[63] such a judgment has the same force and effect in *all* aspects, as the statute expressly states, as a judgment in an action.[64]

It is true that from the standpoint of this study an employee is not a party to the union-employer arbitration unless he has actively participated by intervention. However, it is the general theory that even an undisclosed cooperation in the control of an action with a party thereto by a person interested in the determination of a question of fact or of law creates a relation of privity of such a person to the party for *res judicata* purposes.[65] In addition, such a person is also a privy of the party because of his consent to the representation by the latter. It has been held that in a situation which permits a choice between jurisdictions, the election estops to deny the validity of the decree. The courts have regarded the participation of a person in a litigation to which he was not a party as his submission to the jurisdiction for which otherwise no basis existed.[66] Assuming as pointed out in previous sections that *ex proprio vigore* of the arbitration clause in the collective contract an employee cannot be regarded as being committed to the determination of his claim by arbitrators, one has to admit, that he has the option to decline his representation by the union in the arbitration, and to commence an action on his own. However, the authorization given by him to the union to arbitrate his claim signifies both his participation in the proceeding and his submission to the jurisdiction of an arbitration board.[67]

At this point, it seems to be necessary to examine the question of representation of an employee by a union. In the *Elgin* case, as it will be recalled, the Supreme Court stated that "an award cannot

63. N.Y., C.P.A. §§ 1461, 1464.
64. *Id.*, § 1464 (emphasis added).
65. 1 Freeman on Judgments (3d ed.) § 432, 433. Cf. Jefferson Electric v. Westinghouse, 139 F 385. (C.C.A. 3d, 1935).
66. Ocean Accident and Guarantee Corp. v. Felgemaker, 143 F. 2d 950 (C.C.A. 6th, 1944).
67. The decision in M. of Utility Laundry Service (Sklar), 300 N.Y. 255 (1949), referring to the submission in the arbitration clause of the very subject matter (negative covenant) concerning only designated employees (plaintiffs) is, therefore, correct, and not inconsistent with Hudak v. Hornell, 304 N.Y. 207 (1952). See also O'Donnell v. Pan Am. World Airways, 200 F. 2d 929 (Cir. 2, 1953).

be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance . . .", because the individual's "rights are separate and distinct from any the collective agent may have to represent the collective interest."[68] There are courts which, in contrast to this view, proceed upon the assumption that nothing more than the right of the union to represent all employees' interests at the bargaining table is required for bringing into existence the power to represent an individual in an arbitration and for making an award binding upon him.[69] Those courts are confronted with the following question: What consequences follow from their above assumption if an employee, having rejected the award, brings an action against the employer, alleging that his interest was not properly protected by the union?

A striking approach to the problem is supplied by another type of action dealing with representatives. It is the class suit. In the leading case *Hansberry v. Lee*[70] Mr. (later Chief) Justice Stone started with reminding us that there "is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Thus, considering the class or representative suit as an exception, he came to the conclusion that where substantial interests of the representative are not necessarily or even probably the same as those of absent persons "represented" by him, due process militates vigorously against giving the decision a binding effect upon them. According to the Supreme Court, the tests for the existence of representation are supplied by these facts: The members are "*in fact* adequately represented by parties who are present, or they *actually* participate in the conduct of the litigation . . . or the interest is joint or the relationship is for any other reason such as *legally* to entitle (the party) to stand in judgment for the (members)." If one of these tests has been met, a binding effect of the decision should be recognized (emphasis added). It may be added that the union's interests, in contrast to the interests of the member or the members

68. For the case, see note 41 *supra*.

69. Charnan et al. v. Pan Am. Airways, 188 F. 2d 875 (Cir. 9, 1951); M. of Mencher, 274 App. Div. 585 (1st Dept., 1948); M. of Sperling (Newton Laundry Service), 264 App. Div. 878 (2d Dept., 1942); Newspaper & Mail Deliverers Union v. Newark Newsdealers Supply, 124 N.Y.L.J. 1721, 19 L.C. 66102 (1950).

70. 311 U.S. 32 (1940). For a splendid analysis of the case, see Chafee, Some Problems of Equity 232 (1950).

which bring a suit for all members of their class,[70a] cannot even be thought of as being identical. As for union and individual interests, they combine "in almost infinite variety of relative importance in relation to particular grievances, from situations in which the two are hostile or in which they bear little or no relation of substance to each other and opposed to others in which they are identified."[71] Every Tribunal which has to handle a class suit should accept the warning furnished by the Supreme Court in the *Lee* case (which "tells us more about class suits than any other Supreme Court case"[72]) against the danger flowing from the invalidity of its own decision.

All the more reason for a demand that, unless an individual employee is given the possibility by proper notices to intervene in the proceedings,[73] the union cannot, in the absence of special authorization or subsequent ratification of its action, be regarded as his proper representative, nor can an unfavorable award be held to be binding on him. Enough has been said to show that the binding effect of an award on the individual requires more than the absence of fraud or collusion on the part of the parties to the arbitration.

CONCLUSION

At present it seems that the individual is the "forgotten man" in our labor arbitration law. History supplies one reason for this phenomenon. The reliance on arbitration as a method of settling disputes had not grown to substantial proportions before the Second World War. The practice of the War Labor Board, which directed the parties in disputes before it, *viz.*, employers and unions, to include arbitration provisions in their agreements, had strongly promoted it.[74]

However, at the time when the Taft-Hartley bill was before the Congress, arbitration was still considered as a matter of the exclusive concern of the union and the employer. Arbitration of individual grievances had nowhere been mentioned in the Taft-Hartley Act. The Report submitted by the Joint Conference Committee of both houses of Congress, a Committee convoked to iron out the differences in the respective bills, noted that arbitration is nowhere men-

70a See, e.g., employee's class suit (for re-instatement) in Masetta v. National B & Alum. F. Co., L.C. 66892 (Oh. App. 1952).
71. Elgin case, footnote 41, 68 *supra.*
72. Chafee, *op. cit.* 236.
73. In Estes v. Union Terminal, 89 F. 2d 768 (Cir. 5, 1937), the court said: "Lane can now intervene or otherwise be made a party to the suit which will afford due process of law."
74. *Labor Relations and The Law, op. cit.* 360.

tioned as such in those bills out of which the Taft-Hartley Act of June 23, 1947, emerged.[75] The Act mentions at one point arbitration; but there it deals with arbitration of "disputes on interests," that is, disputes about what the new terms such as wage increases should be.[76] It was not until 1949 that the first cases brought the problems, set forth in the preceding sections, to the lawyer's mind.[77]

In his book "The Common Law," Mr. Justice Holmes referred to the fact that "the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other which have not yet been absorbed or sloughed off."[78] We might consider the strong public policy in favor of organizational powers, which had culminated in the exclusive representation principle, as almost "historical." As a matter of historical fact, our labor law has become essentially the law of organized labor. Save for the individual grievance provision, often referred to elsewhere in this paper, the legislature has so far failed to define the place of the individual in the arbitral institutions. This task, which was not before in the mind of the legislators but is now presented by those forces of life to which Holmes' statement refers, should not be shirked in view of the confused and conflicting state of judicial opinions.

The legislators should extend their preparations to an examination of the question how other peoples have dealt with the problems. The new German law allows the parties to the collective bargaining contract, viz., union and employer or association of employers, to provide for arbitration for collective disputes.[79] By contrast, controversies involving the individual employment relationship fall within the compulsory jurisdiction of the labor courts.[80] Similarly, the French Labor Code in its amended form of 1950[81] permits the parties to a collective contract to insert therein an arbitration clause for "collective conflicts."[82] Controversies arising out of the employment relationship are to be handled by a labor court (*conseil des prud'hommes*). Analogous is the approach of the Austrian law.[83] The

75. House Report No. 510, p. 62 submitted on June 3, 1947, 80th Cong., 1st Sess.
76. Labor Management Relations Act (Taft-Hartley), § 201 (b).
77. The dates of the cases are ascertainable from the footnotes of this paper.
78. The Common Law 36 (1881).
79. Law on Labor Courts of September 3, 1953, (B.G. Bl. I 1267) § 101 (1).
80. There is an exception for actors, and other artists. *Id.* § 101 (2).
81. Code du travail, livre I, ch. IV *"bis"*, Art. 31 g.
82. The French interpretation points to conflicts affecting "general and common interests", which can be prosecuted only by parties representing such interests.
83. Act of July 24, 1946 (B.G. Bl. 1946, 170) §1 (1), §4 (Compulsory

Italian Code of Procedure came into effect during the era of fascism. In that era compulsory jurisdiction was exercised over collective disputes by *"magistrature di lavoro"* (labor magistrates) which were special divisions of the courts of first instance. Consequently, the Code denied an arbitral tribunal any competence even in collective labor disputes.[84] Anarchronistic as such a provision appears to be in the new democratic country, it has not yet been repealed. In the light of this survey one might conclude that the necessity for a separation of individual labor disputes from collective disputes has been recognized everywhere.

In this country no labor courts exist. Here, the sympathy for labor arbitration shared by unions and employers alike, is a factor to which one has to defer and all the more so because, in the last resort, an arbitral tribunal shows substantially the same structure as a European labor court because a panel consists of an employer and a union representative with an impartial arbitrator as chairman. It does not seem to matter much what name such a tribunal has; but it does matter which guarantee the proceeding offers in an individual case that the griever may, if he likes to, prosecute his claims according to his own plan. The best guarantee has to come from a legislative amendment drafted in the image of the individual-grievance provision of the Labor Management Relations Act. This alone would not be sufficient; for still an employer could decline to arbitrate the case against an employee as a party. Logically, the agreement on the arbitration is his own act, a fact which overcomes any doubts about the voluntary basis for the utilization of the arbitration clause for individual disputes. In any case, the employer's acceptance of the clause can by statute be construed as an act by which he also submitted to the invocation of the clause by any employee of the unit for which the collective contract was entered into. Naturally, the amendment would have to include a provision to the effect that in case of an amicable adjustment of the claim, the union must be given opportunity to be heard with respect to the question of whether such an adjustment is not inconsistent with the terms of a collective-bargaining contract. In other words, it has to be a prerequisite for such an adjustment that is is consistent with the contract. This writer respectfully submits this suggestion for a simple legislative amendment as a just and practicable solution of an important problem.

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jurisdiction of Labor Courts over disputes arising out of the individual employment relationship.).

84. Codice di Procedura Civile (1940), art. 806 (denying arbitration for individual employment disputes) and art. 808 (denying arbitration of collective disputes).

ARBITRATION AND INDUSTRIAL PEACE*

James P. Mitchell

It is a privilege and a pleasure to participate in this useful forum, and I would like to compliment the sponsors and the organizations who cooperated in making this forum possible. Gatherings such as this make it possible for us to exchange information and ideas and learn from each other. Greater mutual understanding will lead to industrial peace and strengthen our economy. Conferences such as this enable all of us to explore possibilities of achieving that peace. Remote from the bargaining table and the everyday plant relationships, we can reflect more dispassionately on the problems of labor and management in industrial relations.

Maintenance of industrial peace is not a direct operating responsibility of the Department of Labor. It is, however, implied in everything we do and it is an indirect part of nearly every responsibility vested in us. The Department of Labor has its duties set only in general terms. The Act of Congress establishing the Department forty years ago assigned to it the responsibility to "foster, promote and develop the welfare of the wage earners of the United States." It is my firm belief that the welfare of wage earners can and must be promoted with due regard for the general national interest. Since workers and their families comprise the overwhelming majority of our population, their personal welfare and the welfare of the Nation are frequently promoted or impaired by the same developments. Workers' interests as individuals and as members of the public usually do not conflict, but when they do workers and the Labor Department both must put the national welfare first.

* An address delivered on February 13, 1954 at a Labor-Management Arbitration Conference jointly sponsored by the University of Southern California, the California Institute of Technology and the American Arbitration Association, with the cooperation of the Los Angeles Central Labor Council (AFL), the Greater Los Angeles CIO Council, the Los Angeles Bar Association and the Personnel and Industrial Relations Association.

In recent months relations between labor and management have improved. In 1953 the total loss of man days through strikes was less than half the time lost through strikes in 1952. We feel that this harmony between labor and management reflects America's determination to accord equal treatment to all groups. All Americans have an interest in the maintenance of a strong and growing economy in our country. No group can prosper if any other segment fails. Industrial workers and employers and farmers should, and I believe will, cooperate to keep us prosperous. No one but the Communists can benefit from economic disaster in the United States. If the Kremlin is counting upon a collapse of our economy, it is, however, going to be sadly disappointed. This past year was the most prosperous in our nation's history. Employment in 1953 averaged a record 62 million and unemployment was at a record peacetime low of 1½ million. To be sure, there has been some decrease in employment and increase in unemployment in the past few months. Nevertheless, we are still at very high levels and are determined to utilize all of our resources to maintain our prosperity.

It is good to study our industrial relations problems remote from the labor-management scene. It gives an opportunity for objectivity and, I hope, for useful discussion. Good industrial relations cannot be created by laws. At best, the Government can only provide the framework in which labor and management operate. Employers and employees themselves must develop better relationships at the plant level and settle their own differences without dictation from Washington. The Government's sole interest is that of protecting the public and not as the advocate of workers or employers. Good industrial relations come from good human relations at the plant level. Arbitration can, however, make a valuable contribution toward good labor relations.

Arbitration is a very useful process for the final settlement of disputes arising out of the interpretation or application of existing contracts. It is a field in which there is, and for some time has been, a continuing increase in work. You all know the factors which have been responsible for the increasing use in recent years of arbitration to settle industrial grievances. Undoubtedly all of you are also familiar with the fact that court procedures are generally not well adapted to the needs of modern labor-management relations and are, in addition, too costly, too prolonged and too technical.

Arbitration permits time-saving, less expensive and less troublesome self-regulation by business and labor. It also has the advantage

of being a private rather than a governmental proceeding. I should like to emphasize this last point, because I share so strongly President Eisenhower's feeling that what we need is less governmental intervention in labor-management relations.

The effectiveness of voluntary arbitration has been so great that unfortunately many parties have tended to forget the role which arbitration really should play. They have, instead, looked upon it as a cure for all their ills. Frequently both labor and management forget that arbitration is the final step, the last resort for peaceful settlement of labor-management disputes, and that it is encumbent upon employers and workers to attempt conscientiously and cooperatively to settle their grievances long before they reach the step of arbitration.

In the long run, healthy labor-management relations depend not upon successful arbitration of disputes, but upon successful day-to-day relations at the local, plant level. If employers on the one hand and their workers and the workers' representatives on the other hand enjoy pleasant, cooperative relations with mutual trust, confidence and respect, most disputes can be settled before they reach the stage of formalizing them into written grievances and arbitration proceedings. Good labor-management relations at the plant level are the real base upon which to build the continuing health of a dynamic, democratic social and economic system.

Arbitration is no substitute for bargaining. Nor is it a substitute for thoughtful and cooperative consideration of grievances by management and labor at every stage of the grievance procedure. The foreman, the shop steward, the superintendent and the union president, as well as the individual workers in the plant, have to develop day-to-day working relations which provide for settlement of their disputes, or the labor relations in the plant will be unhealthy. Arbitration cannot make them healthy. It can only help heal some of the sores which have not responded to other treatment and which are irritants because they are open and festering. You will permit me to express some of my own complaints about arbitration and arbitrators. Here are a few of the pitfalls of arbitration:

1. Many arbitrators unduly inject themselves into the case, interrupting the orderly presentation of the case by the representatives of the respective parties. While great latitude is permitted to arbitrators with respect to the adherence to the normal rules of evidence and legal procedures, the parties should be permitted to present the case in their own manner.

2. Many arbitrators deem themselves self-appointed industrial

statesmen and proceed in their awards to lecture the parties on how they should conduct their collective bargaining relations. Very often their criticisms are directed to the personal policies and practices of the company. Such arbitrators fail to realize that there is now maturity in labor relations, and that the parties to a collective bargaining agreement should be presumed to have carefully considered the particular contract provision and have been completely advised in their choice of language. When an arbitrator attempts to substitute his own judgment and wisdom for that of the parties, he is exceeding his authority. For example, in a case I have read in which the question submitted to the arbitrator was whether good cause existed for the discharge of an employee, the arbitrator found that no just cause existed but sustained the discharge on other grounds. He then went on to offer the following gratuitous advice: "For reasons stated, the dismissal of John Smith is hereby sustained. At this time, it might be proper to point out to the company that in cases of the type discussed, it should not resort to discharge until it has met with the Union. . . ."

3. Arbitrators should pay more attention to selling the losing party on the correctness of their award by a logical refutation of the position taken by the party. A hastily written award which ignores or cavalierly brushes aside the position taken by the losing side is not the type of award which can lead to a stable relationship.

4. Arbitrators often write awards that cannot be easily understood by either the employer, the employees affected or the union representatives. Awards should be written for the layman, and not with an eye to demonstrating the erudition of the arbitrator. Arbitration awards must be applied to practical day-to-day employer-employee relationships. If the award becomes obscure by reason of flights of academic language, then it defeats its own purpose. For example, I know of a case in which the issues presented to the arbitrator involved union security and re-determination of the bargaining agent. The arbitrator's erudition got the better of him. He found that there was "a contest of extra-legal relations and interests which in general must, for the present, at least, be resolved by the force of ethical and economic factors resting ultimately on the exercise of economic power." The arbitrator then explained that his inquiry "involves an examination of so wide and general a field of social doctrine that, at the risk of appearing pedantic and in what may seem a pargon-like vocabulary, I must deal briefly with what I think will be agreed upon as fundamental lessons of experience in an orientation which now holds the stage in the economic drama."

What the arbitrator called "dealing briefly" figures out as best I can judge to approximately 1,200 words of *discussion* such as this: "We have the institution of private property. This may be conceived in terms of natural right adhering to a free will, an absolutist concept or, in social terms, in which control of use is permitted to the individual until the general interest requires its modification. In the former sense, property becomes more or less identified with personality, and its invasion tends to arouse a primitive savagery."

And, "Considering the immense stage in which these relations now appear, it would be a sad commentary on what we call Christian civilization if every foot of that field would have to show the waste of conquest by economic struggle. There is still and may always be a residue of this area, which it will be beyond the powers of man to conquer by the force of his intellectual or spiritual faculties, and a similar residue may remain in economic relations." And on and on and on in this same vein goes the learned exposition.

Finally, the arbitrator comes to the point and says: "From these general considerations, I pass to the particular problem." Can you picture the average guy reading that decision and knowing what it is all about?

I have several other pet peeves which I shall just mention in passing: Arbitrators should decide only issues clearly presented by the agreement and not go outside the agreement; arbitrators should arbitrate, not mediate; awards that "spilt the difference" do not impress either side with the impartiality or the ability of the arbitrator; arbitrators should not forget their judicial responsibility and should not use the "box-score" technique of deciding cases.

I am aware of the excellent labor relations in the Los Angeles area. The fact that you are holding this conference indicates you are not willing to rest on your laurels but are constantly searching for new and better ways of promoting industrial peace through voluntary means. Your attendance here and participation in this conference are highly commendable evidence of your enlightened approach to labor-management problems. Your exploration of these problems should be an example to other groups and encourage them to take the time and trouble to try to develop effective approaches to labor-management disputes.

DRAFTING ARBITRATION CLAUSES FOR DISPUTES IN CLOSELY-HELD CORPORATIONS*

F. Hodge O'Neal

Before drafting an arbitration clause the lawyer must get the shareholders or other interested persons to decide exactly what types of controversies they wish to be subject to arbitration. Occasionally the shareholders will want only specified kinds of disputes to be included. For example, arbitration has been limited to the resolution of disputes on how to vote stock subject to a voting agreement.[1] And, in another instance, arbitration was expressly restricted to the question of whether a shareholder should be voted out of the corporation at shareholders' meetings.[2] Ordinarily, however, the shareholder will want all intra-institutional disputes to be determined by arbitration. If this is the intention of the parties, it should be expressed in clear and unequivocal language. As a general proposition, the courts construe arbitration clauses narrowly, in many instances frustrating the apparent intentions of the parties to the agreement.[3] The courts seem to fear that they will stretch the meaning of an arbitration clause and thus deprive someone of his fundamental right to seek redress in the courts, and, therefore, they usually will not compel

* Excerpted, with permission, from Harvard Law Review, March 1954.

1. See Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 29 Del. Ch. 318, 49 A.2d 603 (Ch. 1946), *modified*, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947).
2. See Matter of Allied Friut & Extract Co., 243 App. Div. 52, 53, 276 N.Y. Supp. 153, 155 (1st Dep't 1934).
3. See, *e.g.*, Matter of Scuderi, 265 App. Div. 1054, 39 N.Y.S. 2d 422 (2d Dep't 1943); Matter of Kennelly (Theodoro Advertising Serv., Inc.), 197 Misc. 667, 95 N.Y.S. 2d 240 (Sup. Ct. 1950); Application of Diamond, 80 N.Y.S.2d 465 (Sup. Ct.), *aff'd mem.*, 274 App. Div. 762, 79 N.Y.S.2d 924 (1st Dep't 1948); Matter of Cohen (Michel), 183 Misc. 1034, 52 N.Y.S.2d 671 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 663, 53 N.Y.S. 2d 467 (1st Dep't 1945); Beattie v. E. & F. Beattie, Ltd., [1938] Ch. 708 (C.A.); *In re* Yenidje Tobacco Co., [1916] 2 Ch. 426 (C.A.). *But cf.* Palmer Plastics, Inc. v. Rubin, 202 Misc. 184, 108 N.Y.S.2d 514 (Sup. Ct. 1951); Britex Waste Co. v. Nathan Schwab & Sons, Inc., 139 Pa. Super. 474, 12 A.2d 473 (1940).

arbitration unless the controversy is clearly within the scope of the provision.

Arbitration provisions in current use in closely held corporations apparently have been lifted from commercial arbitration forms designed to cover inter-institutional disputes. At any rate, they are lacking in originality. Further, draftsmen for closely held corporations seem to have made no effort to mould arbitration clauses to the special needs of particular enterprises. Actually, variations may be called for by any of numerous factors: the laws of the jurisdiction where the corporation is being organized, the nature and scope of the business, the management pattern used in the business, the number of persons who are to participate in the enterprise, and the skills, temperaments, and personalities of the participants.

However, the clauses actually used, of which the following is perhaps typical, do not appropriately reflect the necessary variations:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.[4]

4. This clause is recommended by the American Arbitration Association for use in agreements for the arbitration of future disputes. See STURGES, CASES ON ARBITRATION LAW 210 (1953). For variations of this clause that have been used in closely held corporations see Application of Gail Kiddie Clothes, Inc., 56 N.Y.S.2d 117 (Sup. Ct. 1945) ("shall be submitted to arbitration to the American Arbitration Association or its designee in accordance with the arbitration laws of the State of New York . . . ."); Matter of Abbey (Meyerson), 274 App. Div. 389, 83 N.Y.S. 2d 503 (1st Dep't 1948), *aff'd mem.*, 299 N.Y. 557, 85 N.E.2d 789 (1949) ("in accordance with the rules then obtaining of the American Arbitration Association and judgment upon the award rendered may be entered in the highest court of the Forum, State or Federal, having jurisdiction. Such arbitration shall be held in the City and State of New York."). The arbitration clause in the agreement litigated in Leventhal v. Atlantic Finance Corp., 316 Mass. 194, 55 N.E.2d 20 (1944), stated: "It is agreed by and between all parties hereto that any dispute, disagreement or controversy arising under this contract which might be the subject of a personal action at law or of a suit in equity shall be submitted to the decision of three arbitrators, one to be appointed by each party, and the two arbitrators so appointed shall appoint a third arbitrator. No party hereto or any agent or employee of such party shall be appointed or act as arbitrator; and the submission shall be made, all arbitrators appointed, and hearings commenced and concluded, without delay. The award of the arbitrators, or a majority of them, being made and reported to the Superior Court for Suffolk County, Massachusetts, within four months from date of submission or within such further time as the Court may on application of the arbitrators allow, the judgment thereon shall be final." For other specimen arbitration clauses, see Matter of Cohen (Michel), 183 Misc. 1034, 52 N.Y.S.2d 671 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 663, 53 N.Y.S.2d 467 (1st Dep't 1945) (in shareholders' agreement); Beattie v. E. & F. Beattie, Ltd., [1938] Ch. 708, 711 (C.A.) (in articles of

The language in which this arbitration clause is couched invites litigation; whether a particular dispute among shareholders or directors "arises out of" or "relates to" a particular shareholders' agreement is a question that calls for resort to the courts. Illustrative of that point is the case of *Matter of Scuderi*.[5] In that case, an agreement guaranteed the election of *F* as an officer and director of the corporation and provided for arbitration of any dispute arising out of the agreement and any cause of action with which any party might deem himself vested by virtue of the contract or an alleged breach thereof. When *F* resigned, an action was brought to test the validity of the election of his successor. An order staying the proceeding on the ground that the controversy was arbitrable was reversed; the court held that the agreement made no provision for the election of *F*'s successor and that the question of the validity of the election was not arbitrable.[6]

In a few instances, draftsmen apparently have attempted to preclude a narrow judicial interpretation of the arbitration clause. For instance, some lawyers add to the typical provision a statement requiring arbitration "in the event any party should deem himself vested with a cause of action by virtue of this agreement or an alleged breach thereof." Recall, however, that although a similiar statement was included in the arbitration clause in *Matter of Scuderi*, the court nevertheless held that the dispute was not arbitrable under the agreement. Perhaps a better approach is suggested by the following rather verbose provision from a shareholders' agreement:[7]

> That the parties hereto do submit to arbitration any and all matters in dispute and in controversy between them and concerning directly or indirectly, themselves and the affairs, conduct, operation and management of the third party [*i.e.*, the corporation] to the

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association); Gillett v. Thornton, L.R. 19 Eq. 599 (1875) (in articles of partnership).

5. 265 App. Div. 1054, 39 N.Y.S.2d 422 (2d Dep't 1943).

6. In Application of Diamond, 80 N.Y.S.2d 465 (Sup. Ct.), *aff'd mem.*, 274 App. Div. 762, 79 N.Y.S.2d 924 (1st Dep't 1948), the court held that the arbitration clause there covered only the relationship of the stockholders *inter se* and did not relate to their fiduciary duties as officers and directors of the corporation. Similarly, in Beattie v. E. & F. Beattie, Ltd., [1938] Ch. 708 (C.A.), the court indicated that a clause providing for arbitration whenever "any doubt, difference, or dispute shall arise between any members of the company, or between the company and any member or members" was not applicable to a dispute between the company and a member in his capacity as director.

7. The agreement was the one involved in Matter of Cohen (Michel), 183 Misc. 1034, 52 N.Y.S.2d 671 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 663, 53 N.Y.S.2d 467 (1st Dep't 1945).

end that all such disputes and controversies be resolved, determined and adjudged by the arbitrators.[8]

Another and probably the best way to guard against a restrictive interpretation is to provide that disagreements concerning the scope of the arbitration clause or its applicability to a particular dispute will be determined by the arbitrators. Although the question of whether a matter in dispute falls within an arbitration clause is ordinarily for the courts to answer, the parties may confer on the arbitrators the power to decide the question.[9]

Once the coverage of the clause is determined other factors must be considered. The draftsman must establish rules to govern the conduct of the arbitration proceedings.[10] If this is not done, speedy arbitration on the merits may be frustrated by procedural quibbles. Of the utmost importance also is the making of some provision for carrying into effect the award of the arbitrators.[11] Many lawyers utilize, as a solution for both these problems, rules that have been developed by the American Arbitration Association or some similar organization. Another factor that must be considered is whether the arbitration agreement complies with statutory formalities. The arbitration statutes invariably state that agreements to arbitrate future disputes

8. The pre-incorporation agreement in Application of Carl (Weissman), 263 App. Div. 887, 32 N.Y.S.2d 410 (2d Dep't 1942), provided broadly that all questions, disputes, and controversies between the incorporators concerning the policies or the management of the affairs of the corporation were to be determined by arbitration.

9. Matter of Behrens (Feurring), 182 Misc. 979, 49 N.Y.S.2d 753 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 930, 58 N.Y.S.2d 216 (1st Dep't 1945), *aff'd* 296 N.Y. 172, 71 N.E.2d 454 (1947); Willesford v. Watson, L.R. 8 Ch. 473 (1873) (arbitration clause in mining lease); Gillett v. Thornton, L.R. 19 Eq. 599, 605-06 (1875) (arbitration clause in articles of partnership); *see* Matter of Kelley, 240 N.Y. 74, 79, 117 N.E. 363, 364 (1925). "Of course persons can agree to refer to arbitration not merely disputes between them, but even the question whether the disputes between them are within the arbitration clause." Piercy v. Young, 14 Ch. D. 200, 208 (C.A. 1879).

10. Many of the pitfalls that the draftsman must avoid in preparing these rules are discussed in Phillips, *A Lawyer's Approach to Commercial Arbitration*, 44 YALE L.J. 31, 45-50 (1934).

11. In Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947), *modifying* 29 Del. Ch. 318, 49 A.2d 603 (Ch. 1946), the court held valid an agreement providing for arbitration but refused to enforce the arbitrator's decision on the ground that the agreement did not empower the arbitrator or the winning party to put the decision into effect. The agreement in Matter of Cohen (Michel), 183 Misc. 1034, 52 N.Y.S.2d 671 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 663, 53 N.Y.S.2d 467 (1st Dep't 1945), provided that the board of arbitrators "shall have the right and authority to determine how its decision or determination as to each, any or all of said issues and matters in dispute may be implemented or enforced."

must be in writing.[12] Furthermore, a few of the statutes set forth rather unusual and arbitrary requirements. For instance, the Rhode Island statute provides that contracts to arbitrate future disputes must be "clearly written and expressed and contained in a separate paragraph placed immediately before the testimonium clause or the signature of the parties,"[13] and the Michigan statute requires an arbitration agreement to be "contained in an instrument separate from the main contract and signed by all of the parties."[14]

G. Guarding Against Invalidity of the Principal Contract

The courts, as a general proposition, will not give effect to an arbitration clause that is part of an illegal contract.[15] The arbitrators' jurisdiction, it is said, must rest upon a valid contract.[16] Thus, the lawyer not only must insure that the arbitration clause he uses is itself legal but he must also make certain that the principal agreement is valid in order to prevent the arbitration clause from falling with the principal contract. Therefore, each provision placed in the principal contract should be checked with care. The courts have sometimes gone to great lengths to hold a shareholders' agreement indivisible and to invalidate the whole agreement if one section is invalid. For example, in *Matter of Abbey (Meyerson)*,[17] the incorporators of an enterprise entered into a pre-incorporation agreement, and shortly after the corporation was organized they made an employment agreement with it; the two agreements contained identical arbitration clauses and the essential terms of the employment agreement had been set forth in the pre-incorporation agreement. One provision of the pre-incorporation agreement purported to vest exclusive management of the corporation in the holders of Class B stock. The court held that the two agreements constituted a single contract, that the management clauses of the pre-incorporation agreement were unlawful, and since the two documents formed one agreement the invalidity condemned the whole of both agreements, including the arbi-

12. *E.g.*, N.Y. Civ. Prac. Act § 1449.
13. R.I. Gen. Laws c. 475, § 1 (1938).
14. Mich. Comp. Laws § 645.1 (1948).
15. Matter of Kramer & Uchitelle, Inc., 288 N.Y. 467, 43 N.E.2d 493 (1942). "It is universally recognized that on principle, invalidity of the main contract entails invalidity of the arbitration agreement." Nussbaum, *The "Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U.L.Q. Rev. 609, 610 (1940).
16. See, *e.g.*, Matter of Abbey (Meyerson), 274 App. Div. 389, 391, 83 N.Y.S.2d 503, 505 (1st Dep't 1948), *aff'd mem.*, 299 N.Y. 557, 85 N.E. 2d 789 (1949); Matter of Metro Plan, Inc. (Miscione), 257 App. Div. 652, 15 N.Y.S.2d 35 (1st Dep't 1939).
17. *Supra* note 16.

tration clauses.[18]

The lawyer who contemplates recommending arbitration as a device for resolving controversies in a closely held corporation encounters formidable problems. At the outset he must weigh the serviceability and determine the workable limits of the arbitral process in corporate decision-making and policy-formulation. If he decides that arbitration would be useful in settling disputes in the particular business situation involved, he then must turn his attention to legal questions of considerable complexity and difficulty. In a few states, a satisfactory arrangement for arbitration cannot be made because the enforcement of agreements to arbitrate future disputes is precluded by common law rules or by narrow arbitration statutes. Further, in practically all jurisdictions, traditional corporate concepts, inflexible statutory norms, and judicial decisions based on obscure policy considerations are waiting to ensnare the draftsman who attempts to depart from the customary pattern of corporate control.

Nevertheless, the legal obstacles can usually be overcome by skillful planning and careful drafting. As a matter of fact, however, the legal maze seems somewhat less confusing and the problems somewhat less difficult when attention is focused on the laws of a single jurisdiction.

In many parts of the country, judicial opposition to the use of arbitration for settling intra-corporate disputes is yielding as deadlocks in closely held corporations become more widespread and businessmen seek a practical way to avoid the dissolution of useful and profitable enterprises paralyzed by dissension. In New York the use of arbitration for settling most disputes in closely held corporations has already won a good deal of judicial approval, and the New York courts are constantly expanding the areas in which they will sustain arbitration. A similar trend can be expected elsewhere. There is no really sound reason why all the shareholders of a corporation should not be permitted by unanimous agreement to arrange for the settlement of intra-corporate disputes by arbitration. If an arbitration arrangement is established to meet a legitimate business need in a closely held enterprise and if it is approved by all interested persons, a modern court could hardly justify a refusal to sustain it. The prophecy can safely be made that in the future arbitration will be extensively used for resolving disputes in closely held corporations.

18. On the other hand, in Motherwell v. Schoof, [1949] 4 D.L.R. 812 (Alta. Sup. Ct.), the court treated a shareholders' agreement as divisible and sustained some of the agreement including part of the arbitration clause, even though important provisions in the agreement were invalid.

WHAT IS EXPECTED OF AN ARBITRATOR?

Watt H. McBrayer

First of all, what is arbitration? As defined by one court, "Arbitration is a contractual proceeding whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent, submit their controversies to such judges for determination." In that definition of arbitration, the term "judge" is used. An arbitrator is perhaps best defined as a "judge" appointed by the parties to a dispute to hear and settle their differences. One court has defined an arbitrator in the following words: "The arbitrator is a judge appointed by the parties; he is by their consent invested with judicial functions in the particular case; he is to determine the right as between the parties in respect to the matter submitted, and all questions of law or fact, upon which the right depends, are under a general submission, deemed to be referred to him for decision."

What are the requirements of an arbitrator? Fairness and good judgement, even more than technical competence, are the primary qualifications of arbitrators of labor disputes. There are no special qualifications that an arbitrator must meet, but rather there are those qualifications that the parties think the arbitrator must meet in their particular case. For example, if the dispute hinges principally upon the interpretation of a contract provision, the parties are likely to select an attorney. In a disciplinary case, a man with a substantial industrial relations background might be preferable. Upon such technical questions as job classifications and wage rates, individuals with industrial engineering experience might be necessary. Woven throughout all of those, however, is the requirement that the arbitrator be familiar with industry practices.

Now, what is expected of an arbitrator? First, the arbitrator must understand that he is interpreting, in a great majority of cases, a written contract that was solemnly entered into by two contracting

parties. He is expected to interpret the contract under the rules of law applicable to contract interpretation and not as he thinks the contract should have been written. He must realize that in most cases there was difficulty encountered by the parties in reaching an agreement during negotiations and in reducing the agreement to writing. He should attempt to find out the intent of the parties so that if there seems to be an ambiguity, or if the contract is silent on the point in issue, he can go into the intent and past practice of the parties. Under no circumstances should the arbitrator write a new contract, or a new contract provision. Some do so, but in so doing the arbitrator cannot help putting either the company or the union in a hole. Yet, what happens when the party concerned contests the arbitrator's decision in such cases? Court action generally follows; but even if the court proves the arbitrator in error, the opposing party can always accuse the other side of welshing on its agreement to abide by the arbitrator's decision, thereby creating unrest contrary to one of the main purposes of arbitration.

An arbitrator must realize that behind every arbitration case is the fact that someone feels that he has been wronged. He should also realize that the grievance has come through several steps of the grievance procedure. It seems that some arbitrators overlook the fact that the company has a great interest in the welfare of its employees: that much time and money have been spent in training its employees. For this reason, the company sometimes would like to make an exception in settling the grievance, but it cannot in view of the labor agreement. To make an exception would be violating the letter of the contract and might adversely involve the interests of other employees covered by the contract. Nevertheless, some arbitrators will insist on attempting to read into the dispute and settlement, "sweetness and light" for the employee who feels he has been wronged.

In one case on record, a pipe line company became involved when certain records indicated that something was wrong at one of their stations. Two supervisors were sent to the area to check on the matter. One night they caught an employee, who held a responsible position, removing oil from the line and placing it in five-gallon containers. This act was contrary to instructions. The two supervisors walked up to the employee, identified themselves, and asked what was going on. The employee told them he was taking the oil to use as fuel in his house trailer. In other words, he made what might be classified as a spontaneous declaration. The employee was dis-

charged. The discharge was consummated only after consultation with superiors. Yet, in the decision, the arbitrator went so far as to say, in discussing the actions of the two supervisors, that "two persons who are on the same side of the fence would add strength to their argument whether they agree on truth or on a corruption of the truth." Continuing further, "the motive or motives for falsifying their testimony, which have controlled these company witnesses, is perhaps not so apparent as with respect to the employee. There is no evidence that either of them had a grudge against X. They probably did not know him well enough for that. When they were asked to check, they checked thoroughly the record reveals. To make a good impression upon their superiors, it is conceivable that they were overly ambitious and catching X taking oil, falsified what he said in order to make their story to the superintendent good, and to justify X's summary discharge. This would give them a record of diligence and faithful service to the company." Later in the opinion, the arbitrator said, "The monetary loss caused by this act was nil since the product was poured back into the sump." He then went into the fact that the employee had a family, that it was the first time the company had ever had trouble with the employee in question, and that the man had a good record. Therefore, all things being considered, he should be put back to work without loss of seniority, but without back pay.

No one likes to see an employee discharged, especially a company which has several years of training invested in the employee, nor does anyone like to see someone steal. Yet, one wonders if the arbitrator really gave any thought to what the effect his including in the opinion his thoughts about the supervisors falsifying their reports would have upon the supervisors of that company and their future relations with employees. Many people who have read the opinion several times and have talked it over with others who have done likewise, hold the belief that the arbitrator's reasoning, at least as it was expressed in his opinion, was practically nil, which leads nicely into the next point.

The parties to an industrial dispute must live with the judgment rendered by the arbitrator. Therefore, is it asking too much for an arbitrator to consider his decision several times before he hands it down, and to ask himself these questions: "Is my reasoning back of this decision sound?" "Is the decision written so that it covers all of the points presented in the question to be arbitrated?" "Is it clearly written so that it can be understood by all the parties

involved?" If the arbitrator's reasoning is not sound, or if it is poorly expressed, or if it does not contain any reasoning, it is highly possible and probable that the decision will create more problems in the future than it settles now.

The objective of arbitration is an adjudication, not compromise. This matter of compromise has been discussed quite extensively and seems to come up at least once at every such meeting as this. Several people have criticized the growing tendency of trading off cases when more than one case is heard by the same arbitrator. Apparently some arbitrators are trying to compromise regardless of the equities involved. A word of warning seems necessary on this point of compromise or trading off. Through this practice, it is possible to negotiate through arbitration, since the complainant is bound to come out with something more than he starts with. The only question which would remain then is whether or not the cost of the arbitration justifies the gain.

I believe that it is realized by most companies, that in that portion of industrial relations leading up to and including arbitration we are dealing with human beings who have feelings, desires, and problems. It is imperative for good employee and good industrial relations, that when a man thinks he has been wronged, he have a chance to express himself and have the matter settled. Therefore, is it not apparent that the arbitrator is violating his trust if he compromises his decision? Is he giving the employee involved a fair deal? For arbitration to succeed, to serve its purpose, and to assume the prominence that it should and could attain, the arbitrators must "call the shots" as they see them.

An arbitrator who complies with these points will be respected. He will be used again, win or lose, if he applies the written contract as he sees it, does not attempt to write a new contract or new provision where it is inappropriate, if he does not try to compromise his decision, if he uses reasoning behind his decision and writes a decision that can be understood. If the arbitrator complies with those points, then both the Company and the Union should be willing to use the same arbitrator again and again.

Passing on, then, to a few more points that are expected of an arbitrator from the company's viewpoint. It seems obvious that the arbitrator should understand the issue or issues involved in the arbitration case, and until he does so, that he should not start hearing the case hoping that he will understand it before the case is over. Let him understand the issues involved and understand them clearly,

and then keep the discussion and the presentation in the case limited to those issues. This does not mean that the case should be tied down by legalistic and hide-bound rules. But there is a happy medium which would prevent the arbitration from turning into a fishing expedition. Why is so much time taken to stress such a fundamental point as urging that the arbitrator understand the issues clearly and keep the discussion closely aligned to the issues? Because some arbitration decisions are made wherein any similarity between the facts in the decision and the way they were presented, was purely coincidental.

We prefer the arbitrator to ask questions. We prefer him to ask questions of the witnesses if he has any point to clear up. Let me go one step further and say that if there is any portion of the case which is not clear to him, or if he desires additional evidence, we prefer that he ask the party affected to bring in that evidence. An arbitrator should not be criticized for asking for additional evidence. Yet some arbitrators are afraid to do so for fear that the parties may think they are tipping their hands as to their thinking. His main fear should be that if he does not, he may not render a good and clear decision. He should bear in mind also that people who work with the labor agreement day in and day out sometimes can't see the forest for the trees. (I might go this far and say I am still looking for the arbitrator who will ask the parties to file a brief on a question.)

Those are the points that come to me as to what is expected of an arbitrator from the company's viewpoint. The practice of arbitration has many weaknesses, to be sure; but all in all, I approve of arbitration since even the most reasonable men will frequently disagree over the meaning of words, and disputes over the interpretation and application of a contract will arise which the parties themselves will not be able to settle.

Here's to better—not bigger—arbitrations.

ENFORCEMENT OF INTERNATIONAL AWARDS

Morris S. Rosenthal

EDITOR'S NOTE: *The following is an address delivered on behalf of the International Chamber of Commerce by Morris S. Rosenthal, Chairman of the Executive Committee of the American Arbitration Association, before the Economic and Social Council of the United Nations, on April 6, 1954. Following this address, the Council unanimously resolved to consider the Draft Convention on Enforcement of International Arbitral Awards which had been published in Arbitration Journal, page 158, 1953.*

It is a genuine source of satisfaction to the International Chamber of Commerce and to me as its representative, that the Economic and Social Council has placed on its agenda our Draft Convention on the Enforcement of International Arbitral Awards. Our organization has had a long-standing interest in international arbitration, and also sponsored the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.

The Draft Convention before you is the product of long study by businessmen and legal experts of 30 countries, and was drawn up after careful review and consideration. Our proposal suggests the judicial enforceability of arbitral awards based primarily on the *will of the parties,* as set forth in the arbitration clauses in the contracts of the parties and in properly held arbitrations pursuant thereto. This is implied in the concept of freedom of contract.

The International Chamber of Commerce proposed its Draft Convention for inclusion on the agenda of the Economic and Social Council, since under Article 62, sub-sections 1 and 3 of the United Nations Charter, the Council is the only proper organ before which this matter can be placed. According to Article 62, only ECOSOC is empowered to prepare draft conventions with respect to international economic matters, such as this proposal of the International Chamber of Commerce. In fact, there is no other body within the

United Nations framework which would have absolute authority to deal with this question. So far as the International Law Commission is concerned, it is our understanding that their schedule of work would not permit taking on such an assignment. Furthermore, according to their statute, their primary objective is the promotion of public international law, and our item clearly belongs to the field of international trade as well as international private law.

Disagreements in themselves are not harmful, since from the intellectual conflict of ideas has come much of the progress of civilization. It is only when these disagreements lead to the use of force and result in the disruption of moral human relationships that they become destructive. Hence the danger lies in the nature of the conflict and the method used in resolving it. Therefore, peoples of good will have sought and are still seeking means by which their disagreements can be settled amicably. The very purpose of the United Nations is to bring the nations of the world together in the hope of solving the many economic, political and social problems that confront all peoples, thereby achieving peace and the betterment of living conditions for all.

Disputes between sellers and buyers in the markets of the world are common. There are controversies in regard to shipments and deliveries, as to the quality of goods, as to differing interpretations of foreign trade definitions and other contractual conditions such as marine insurance, terms of payment, foreign exchange regulations and other technical details which enter into any foreign trade transaction. Centuries ago traders learned the wisdom of submitting their disagreements to arbitration for a fair, speedy and friendy adjudication, so that the practicability of commercial arbitration has been proven. In the last 50 years, there has been a steady and increasing resort to arbitration among private traders and government agencies that buy and sell goods, and skilled arbitration systems and tribunals have been developed in many countries. In the Court of Arbitration of the International Chamber alone many such commercial cases have been dealt with since its inception in 1923.

I would emphasize that the inclusion of an arbitration clause in a contract whereby the parties agree to submit subsequent disagreements to arbitral adjudication is entirely *voluntary* on their part, and in no sense compulsory. Those who include such clauses in their contracts recognize the obvious advantages of this method of adjudication. They know of the congestion of law courts everywhere. They also know that lawsuits are often long drawn out, frequently bitter,

and always costly. They further know that arbitrations are conducted quickly, economically and in a friendly atmosphere. They appreciate that those chosen to serve as arbitrators are competent, fair and well-versed in international trade customs and practices, and that the awards will be justly made in the light of an intelligent interpretation of the contract.

The International Chamber of Commerce submits its proposed Draft Convention because of two basic problems that confront those who voluntarily use this method of adjudicating their disputes. *First,* there is the need of assuring that an agreement in a contract to submit disputes to arbitration is a valid one, and that subsequently neither party can refuse to abide by the arbitration provisions of the contract to which both parties voluntarily agreed. *Secondly,* there is the further need that a party cannot afterwards refuse to comply with the award, either because the arbitral procedures agreed to by the parties are not strictly in conformity with the procedural laws of the country in which the arbitration is held, or of the country in which enforcement is sought, or because of the difficulties at times to enforce arbitral awards rendered in foreign jurisdictions.

The International Chamber of Commerce feels that the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards which is reproduced in E/C.2/373/Ad.1 no longer corresponds to the requirements of international trade. Although at the time of its adoption, it was generally considered a step forward, it seems to our organization that it no longer entirely meets modern economic requirements. One of its substantial weaknesses is that arbitration awards made in foreign jurisdictions are enforceable only when they are in accordance with the procedural law of the country in which the award is to be enforced. This seriously limits the practical application of international commercial arbitration. It would be helpful to all international traders if there were an International Convention which would recognize the validity of an arbitration clause in a contract, and would also enable the winner of an award to obtain its legal enforcement in the jurisdiction of the loser. The proposed Convention of the International Chamber would accomplish this through multilateral agreement among nations. It is assuredly consistent with the purposes and principles of the Economic and Social Council to adopt such an International Convention for submission to Member Governments of the United Nations.

There may be differing views as to wording and as to some of the technical provisions of the Draft Convention which the Chamber

is sponsoring, but we strongly believe that everyone recognizes the wisdom and value of arbitration, and that whatever technical differences exist, can be easily resolved. The basic principles are those pertaining to the *validity* of the arbitration clause and to the *enforcement* of awards in foreign jurisdictions. There must of course be safeguards and provisions consistent with national laws and policies. The International Chamber of Commerce has tried to enumerate these in Article IV of the Draft before you, and feels that this Article is a basis for further consideration in the drafting of a final Convention for approval by the Council.

The International Chamber is not asking the Council at this session to pass on the substantive provisions of our Draft Convention. We hope that the Council may find it desirable to set up an ad hoc Committee to study this Draft Convention with the anticipation of submitting a final Draft Convention to a later session of the Council for its consideration. Such a procedure, if I am not mistaken, has been applied in the past and in approving of it, no government is now binding itself to future action. Assuredly, the principle and objectives of commercial arbitration are so generally recognized and so widely accepted that all governments can properly support our proposal for this study. In setting up such a committee, the Council may want to draw upon the competence of the legal and economic professions, and the experience of the international business community. Toward that end, the International Chamber of Commerce would be only too pleased to furnish any assistance the Council may desire.

The advancement of international economic relations is of greater importance now than ever before in human history. International economic and social cooperation has its world-wide framework today in Article 55 of the Charter. The Economic and Social Council was set up to implement the provisions contained in that Article. The International Chamber strongly believes that by the adoption of a Convention on the Enforcement of International Arbitral Awards, the Council can help substantially to lessen some of the barriers to the increased flow of goods. In this way, the Council can make an important contribution to the furtherance of world peace, through the advancement of international trade. On behalf of the International Chamber may I again express our appreciation for this opportunity of appearing in support of our Draft Convention.

DOCUMENTATION

ARBITRATION IN ECONOMIC AND TECHNICAL ASSISTANCE AGREEMENT WITH SPAIN. An agreement for Economic and Technical Assistance to Spain, concluded on September 26, 1953 (text in Department of State Bulletin No. 745, October 5, 1953, p. 436), provides for arbitration of disputes between nationals of the United States and Spain through the International Court of Justice "or of a court of arbitration or arbitral tribunal to be mutually agreed upon." The text of Article IX of this agreement, embodying the arbitration provisions, is as follows:

> (1) The Governments of the United States of America and Spain agree to submit to the decision of the International Court of Justice, or of a court of arbitration or arbitral tribunal to be mutually agreed upon, any claim espoused or presented by either Government on behalf of one of its nationals arising as a consequence of governmental measures (other than measures taken by the Government of the United States of America concerning enemy property or interests) taken after April 3, 1948 by the other Government and affecting property or interest of such national, including contracts with or concessions granted by the duly authorized authorities of such other Government. It is understood that the undertaking of the Government of the United States of America in respect of claims espoused by the Government of Spain pursuant to this paragraph is made under the authority of and is limited by the terms and conditions of the recognition by the United States of America of the compulsory jurisdiction of the International Court of Justice under Article 36 of the Statute of the Court, as set forth in the Declaration of the President of the United States of America dated August 14, 1946.
>
> (2) It is further understood that neither Government will espouse or present a claim pursuant to this Article until its national has exhausted the administrative and judicial procedures of the country in which the claim arose.
>
> (3) The provisions of this Article shall be in all respects with-

out prejudice to other rights of access, if any, of either Government to the International Court of Justice or other arbitral tribunal or to the espousal and presentation of claims based upon alleged violations by either Government of rights and duties arising under treaties, agreements or principles of international law.

NEW YORK STATE ARBITRATION STATUTE AMENDED. The Civil Practice Act (Section 1451 of Article 84) of New York State was amended on March 24, 1954 to permit courts of inferior jurisdiction to stay actions or proceedings brought before them in violation of arbitration agreements. Heretofore, only the Supreme Court could take such action. The amendment came about through a bill introduced into the Legislature by Assemblyman Ludwig Teller, a member of the Arbitration Law Committee of the American Arbitration Association. The amended Section 1451, with the new words italicized, reads as follows:

"Stay of proceedings brought in violation of an arbitration contract or submission. If any action or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section fourteen hundred forty-eight the supreme court *or the court in which such action or proceeding shall be brought,* or a judge thereof, upon being satisfied that the issue involved in such action, or proceeding is referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, shall stay all proceedings in the action or proceeding until such arbitration has been had in accordance with the terms of the contract or submission."

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

REFERENCE ON SALES SLIP TO COTTON YARN RULES DOES NOT CONSTITUTE CLEAR CONSENT TO ARBITRATE in spite of a provision to arbitrate included in those rules. The Court of Appeals, by a majority of three to four, reversed a lower court. In following the similar holding in *Gerseta Corp. v. General Silk Importing Co.,* 234 N.Y. 513 (1922), dealing with the Raw Silk Rules of the Silk Association of America, and distinguishing the recent case of *Level Export Corp. v. Wolz, Aiken & Co.,* 305 N.Y. 82 (digested in *Arb. J.* 1953 p. 45), dealing with the Standard Cotton Textile Salesnote, the court said: "If part of the care exhibited in drafting the rules had been used in mentioning arbitration in the contract, there would be no difficulty in affirming the order appealed from. Instead, the form of words favored by these trade associations appears to have been designed to avoid any resistance that might arise if arbitration were brought to the attention of the contracting parties as the exclusive remedy in case of disputes." *Riverdale Fabrics Corp. v. Tillinghast-Stiles Company,* 306 N.Y. 288 (Van Voorhis, J.).

AN ARBITRATION CLAUSE ON THE REVERSE SIDE OF A PAPER DOES NOT BIND A PARTY IN SPITE OF HIS HAVING SIGNED IT IN ABSENCE OF ANY OTHER CLEAR REFERENCES OR PROOF THAT THE ARBITRATION CLAUSE WAS CALLED TO HIS ATTENTION. A motion to stay a New Jersey court action was therefore denied (see *Arthur Philip Export Corp'n v. Leathertone,* 275 App. Div. 102)." *Prodotti Alimentari, &c. v. Orig. R. & R. Empire Pickle Works, Inc.,* N.Y.L.J., March 2, 1954, p. 6, Schreiber, J.

EXCHANGE OF CORRESPONDENCE OBLIGATED PARTIES TO ARBITRATE WHEN CORRESPONDENCE REFERRED TO A STANDARD CONTRACT FORM OF THE AMERICAN SPICE TRADE ASSOCIATION, which included an arbitration clause. *Dalmation Sage Exporters v. Ludwig Mueller Co., Inc.*, N.Y.L.J., March 9, 1954, p. 7, Schreiber, J.

ARBITRATION CLAUSE IN A WRITTEN CONTRACT IS ENFORCEABLE EVEN WITHOUT A SIGNATURE WHEN BUYER RETAINED AN "ACKNOWLEDGMENT OF ORDER" WHICH CARRIED ON ITS FACE THE WORDS: "THIS CONTRACT SUBJECT TO TERMS AND PROVISIONS PRINTED ON THE REVERSE SIDE." The buyer ordered goods on a "bill and hold" basis and requested some samples be sent to his designer. Seller made delivery and invoiced it against original contract previously received by buyer. The samples were accepted and retained by the buyer who later advised the seller that his designer did not approve the quality. He therefore requested cancellation of the purchase. The seller asked arbitration which the buyer resisted, claiming no signed contract had been concluded and that there was no agreement on the arbitration clause which appeared on the reverse side of the contract. The court, in holding that signature on the contract is not a prerequisite to the enforcement of the arbitration clause, said: "The arbitration law of this state, with respect to future controversies, merely requires that the contract be in writing, but does not require the signature of the parties sought to be charged therewith (Sec. 1449, Civil Practice Act)." The Court further held that the buyer, in retaining the "Acknowledgment of Order" which carried on the face the words "This contract subject to terms and provisions printed on reverse side," was therefore legally bound by its arbitration provision. The court differentiated this case from *Albrecht Chemical Co. v. Anderson Trading Corp.*, 298 N.Y. 437, where the seller had neither signed nor returned the purchase order, but instead had sent the buyer his own memorandum of sale, and also *Airedale Worsted Mills v. Bonnie Classics*, 98 N.Y.S. 2d 353, where the order forms contained the condition that it was not to become a contract until accepted by the seller. This decision of Special Term, N.Y.L.J., December 10, 1953, p. 1400, was affirmed by a majority of the App. Div. (1st Dept.). *Helen Whiting, Inc. v. Trojan Textile Corp.*, N.Y.L.J., February 17, 1954, p. 7.

RETENTION OF PURCHASE NOTE SIGNED BY BUYER ALONE WAS "INSUFFICIENT TO ESTABLISH AGREEMENT TO ARBITRATE" even though the note read: "Please sign and return one copy immediately. Failure to do so may, at buyer's option, invalidate the confirmation." The retention of the purchase note was considered "insufficient to establish the writing necessary to support an agreement to arbitrate." *Kleyman Export Corporation v. Chemsol, Inc.*, N.Y.L.J., January 25, 1954, p. 7, Nathan, J.

REFERENCE TO TERMS OF BURLAP AND JUTE ASSOCIATION CONTRACT DOES NOT OBLIGATE GUARANTOR OF A CONTRACT TO ARBITRATE SINCE THE ARBITRATION CLAUSE IS APPLICABLE ONLY TO PARTIES. In staying arbitration instituted against a guarantor, the court said the arbitration clause was "not broad enough to encompass

disputes between buyer and seller on one hand and a guarantor on the other." *H. D. Sheldon & Co., Inc. v. Anniston Mills, Inc.*, N.Y.L.J., February 17, 1954, p. 7, Schreiber, J.

A THIRD PARTY NAMED IN A COURT ACTION WHO IS NOT A PARTY TO AN AGREEMENT CONTAINING AN ARBITRATION CLAUSE CANNOT BE COMPELLED TO ARBITRATE. Said the court: "The party in question, a domestic corporation, was allegedly formed by the individual petitioner in violation of the agreement and was managed, in violation of that agreement, to the disadvantage of the corporate petitioner and respondent, who seeks, in the action, to obtain an accounting of that corporation's profits. This court in this proceeding cannot grant any relief against the corporation not a party to the agreement." *Ratner v. Winick*, N.Y.L.J., January 11, 1954, p. 7, Nathan, J.

GUARANTOR MAY NOT STAY ACTION AGAINST HIM AS CO-DEFENDANT OF A CORPORATE DEFENDANT WHICH IS A PARTY TO AN ARBITRATION AGREEMENT WHEN GUARANTOR IS NOT HIMSELF A PARTY TO THAT AGREEMENT. (See *Lehman v. Ostrowsky*, 264 N.Y. 130). *Walters v. Hudson Press, Inc.*, N.Y.L.J., March 23, 1954, p. 6, Eder, J.

CORPORATE MANAGEMENT DISPUTE IS ARBITRABLE WHERE CONTRACT FOR FORMATION OF CORPORATION CONTAINS ARBITRATION CLAUSE. The court said that the provisions of corporate certificates and bylaws seem immaterial where parties had agreed to arbitrate. "Concededly the parties now before the court are in entire control of the corporations, which are only a vehicle for the business of these individuals." *Katz v. Burkin*, N.Y.L.J., March 1, 1954, p. 12, Johnson, C.A., J.

II. THE ARBITRABLE ISSUE

FAILURE TO PERFORM AGREEMENT SET FORTH IN AN AWARD IS NOT ARBITRABLE. A lease provided for arbitration "should any dispute arise as to whether repairs or replacements are necessary." During an arbitration on the necessity of repairs to be made by the tenant, an agreement was reached to be treated "as though the list of the attached repairs, painting, etc. was the award of the arbitrators chosen by us, and to have the same force and effect." Since this agreement determined the necessity of repairs, this question could not be reopened by arbitration. Said the court: "The present dispute relates to compliance with the award agreement and that is not arbitrable under the lease." The landlord further alleged that the tenant had breached the lease by failure to remove a violation issued by the N. Y. State Department of Labor, and instituted summary dispossess proceedings in the Municipal Court. That proceedings was not to be stayed, inasmuch as the arbitration clause did not cover such violations as arbitrable issues. Said the court: "Compliance with the rules and orders of governing bodies is not limited to the making of repairs," which latter issue alone was covered by the arbitration clause. *Goldmar Hotel Corporation v. Morningside Studios, Inc.*, N.Y.L.J., February 25, 1954, p. 7, Corcoran, J.

DISPUTE OVER LAY-OFF BY SENIORITY IS ARBITRABLE. ARBITRATION NOT BARRED BY PREVIOUS ARBITRATION INVOLVING DIFFERENT EMPLOYEES AND ANOTHER UNION. *Montauk Iron & Steel Corp. v. International Brotherhood of Teamsters, Local 815, A.F.L.*, N.Y.L.J., March 15, 1954, p. 8, Dineen, J.

CANCELLATION OF A CONTRACT FOR ALLEGED NON-PERFORMANCE DOES NOT REMOVE OBLIGATION TO ARBITRATE. The contract, which included an arbitration clause, expressed the right of the buyer to cancel as follows: "Buyer reserves the right to cancel this order if not filled in accordance with the delivery schedule or specification." The buyer had cancelled an order, alleging non-compliance. He then resisted arbitration on the ground that the contract was cancelled. The court held that the cancellation clause did not relieve the buyer of his obligation to arbitrate. The court directed arbitration, differentiating this case from *Alpert v. Admiration Knitwear*, 304 N.Y. 1, where the contract gave to the seller the arbitrary right to demand payment in advance of shipment, and to abandon the contract upon the purchasers' failure to comply. The court noted that the cancellation clause cited above does not reserve to the buyer such unequivocal right as exercised in the *Alpert* case. *Jac-Lar Products Co., Inc. v. S. & S. Corrugated Paper Machinery Co., Inc.*, N.Y.L.J., March 5, 1954, p. 10, Kleinfeld, J.

UNION DEMAND FOR RETRACTION OF CHARGE OF MISCONDUCT AGAINST EMPLOYEE NOT ARBITRABLE UNDER CLAUSE LIMITING ARBITRATION TO DISCHARGES AND CONTRACT INTERPRETATIONS. Application to compel arbitration was denied under authority of *Matter of General Electric Co.*, 300 N.Y. 262. *Russ v. Prudential Insurance Co.*, N.Y.L.J., March 18, 1954, p. 7, McNally, J.

DEMAND FOR SEVERANCE PAY IS ARBITRABLE UNDER BROAD ARBITRATION CLAUSE. Severance pay was not provided for in an agreement which contained a broad arbitration clause on "any claim, demand, dispute or controversy between the parties hereto, including but not limited to a demand or dispute arising out of a proposed addition, deletion or modification of the agreement." The court held that under that clause the question whether or not a provision for payment of severance wages may be added to the agreement is for the arbitrators to determine. The court added that "the question of the amount thereof, if they find that such a provision may be properly added, is likewise a matter of arbitration (*Bohlinger v. The National Cash Register Company*, 305 N.Y. 539)." *Klenk v. International Brotherhood of Teamsters*, N.Y.L.J., January 11, 1954, p. 6, Nathan, J.

MINIMUM PAY AWARD FOR WEEK-DAY WORK VACATED AS GOING BEYOND SCOPE OF SUBMISSION WHICH CONFINED ARBITRABLE ISSUE TO PAYMENT FOR ORDERED SHAPE-UPS ON SATURDAYS. *O'Rourke (Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.) v. Brighton Materials Co.*, N.Y.L.J., March 9, 1954, p. 7, McNally, J.

DISCHARGE OF EMPLOYEE FOLLOWING TENTATIVE DENIAL OF SECURITY CLEARANCE SUBJECT TO ARBITRATION UNDER CLAUSE COVERING "ALL DISPUTES, DIFFERENCES AND GRIEVANCES WHICH MAY ARISE OUT OF THIS AGREEMENT." *Fitzgerald v. Sperry Gyroscope Co.*, N.Y.L.J., March 29, 1954, p. 8, McNally, J.

NON-PAYMENT OF CUSTOMARY YEAR-END BONUS NOT ARBITRABLE WHERE EMPLOYER IS NOT OBLIGATED BY CONTRACT TO PAY SUCH BONUS. The court held that inasmuch as an arbitrator may not rewrite the contract, arbitration could be stayed under authority of *International Association of Machinists v. Cutler-Hammer, Inc.*, 271 A.D. 917, aff'd 297 N.Y. 519, and referred to the exclusive jurisdiction of the National Labor Relations Board. *Daco Machine & Tool Co., Inc. v. Redis*, N.Y.L.J., March 25, 1954, p. 8, McNally, J.

MERIT INCREASES NOT ARBITRABLE WHERE CONTRACT STATES THAT "MERIT INCREASES ARE AT THE SOLE DISCRETION OF THE EMPLOYER." In referring to *Matter of Western Electric Co.*, 277 A.D. 858, aff'd 301 N.Y. 727, the court stayed arbitration. The union had demanded arbitration, alleging that the company had violated the provisions of the agreement by granting general wage increases under the guise of merit increases. *Taft v. Sperry Gyroscope Company*, N.Y.L.J., February 25, 1954, p. 6, Schreiber, J.

NON-UNION EMPLOYEES ARE SUBJECT TO ARBITRATION CLAUSE OF CONTRACT WHERE THE AGREEMENT PROVIDED FOR ARBITRATION OF ALL GRIEVANCES "RELATING TO THE EFFECT, INTERPRETATION, APPLICATION OR CLAIM OF BREACH OR VIOLATION OF THIS AGREEMENT." Said the court: "The issue before the court is whether the union's position in the controversy calls for an interpretation or application of any provision of the agreement. This court will not interpret whether the contract covers the seventeen employees. This should be left to arbitration." *Amperex Electronic Corp'n v. Rugen*, N.Y.L.J., March 15, 1954, p. 14, Hill, J.

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

DEMAND FOR ARBITRATION IS VALID WITHOUT SIGNATURE OF BOTH PARTNERS OF A PARTNERSHIP. In reversing an order which denied an application to compel arbitration, the App. Div. (Second Dept.) said: "Both partners having signed the contract of March 15, 1952, to submit all future controversies to arbitration (Partnership Law, § 20, subd. 3, par. e, it is not necessary that both join in a demand for arbitration of a dispute between the partnership and the third persons with whom the contract was signed. Such a demand is one for the purpose of the partnership business and every partner is an agent of the partnership with respect thereto. (Partnership Law § 20, subd. 1). The dispute between the partners is immaterial to the arbitration of the dispute between the partnership and the third parties." *Damsker v. Carey*, 283 App. Div. 119, 127 N.Y.S. 2d 355.

WHETHER A DEMAND FOR ARBITRATION WAS UNREASONABLY DELAYED IS FOR ARBITRATOR TO DETERMINE, under a ship salvage agreement which provided for arbitration of "any differences arising out of this Agreement or the operations thereunder" by a committee of Lloyds' in London. Salvagers, having towed a stranded vessel into the harbor of San Juan, Puerto Rico and not having obtained acceptance of the tender, demanded security and libelled the vessel. A demand for arbitration by the shipowner was challenged as unreasonably delayed, but the court considered this one of the questions to be arbitrated and stayed the salvage suit pending the outcome of the arbitration. *Porto Rico Lighterage Company v. Marte Cia., Nav. S.A.*, 1954 American Maritime Cases 377 (S.D. N.Y., December 11, 1953, Goddard, D. J.).

"UNREASONABLY HARSH" TIME LIMIT IN CONTRACT FOR MAKING CLAIM IS NO BAR TO ARBITRATION. Referring to *River Brand Rice Mills v. Latrobe Brewing Co.*, 305 N.Y. 36 (see Arb. J. 1953 p. 40), the court said that extension of the time limit "would at most authorize submission to arbitration notwithstanding the expiration of the time limit for making claims." *Sacks v. American Silk Mills, Inc.*, N.Y.L.J., February 16, 1954, p. 7, Schreiber, J.

ARBITRATOR'S AWARD MAY NOT INCLUDE ISSUE PREVIOUSLY SETTLED BY PARTIES WITHOUT THEIR CONSENT. Appointment of a third arbitrator by court order without a hearing required by sec. 1282 of Cal. Code of Civil Procedure was not a determination as to what matters were in dispute and subject to arbitration. When parties to a construction contract had settled all disputed issues but one, the arbitrators should not have considered all the matters listed by the owner, without any agreement on the part of the contractor. An award embracing matters not submitted to the arbitrators was therefore modified inasmuch as the arbitrators were not the sole judges as to the matters that are subject to arbitration. Said the court in affirming: "A procedure under sec. 1282 of the Code of Civil Procedure is in substance a suit in equity for specific performance of a contract to arbitrate (*Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 182 P. 2d 182). This would be an idle proceeding if it did not have for one of its purposes an adjudication with respect to the scope of the arbitration to which the parties have agreed to submit their differences." *Doyle v. Hunt Construction Company, Inc.*, 123 Advance Cal. App. Reports 57 (Second Dist., February 3, 1954, Shinn, P. J.).

EXPIRATION OF A CONTRACT DOES NOT PREVENT ARBITRATION OF DISPUTES WHICH AROSE DURING LIFE OF COLLECTIVE BARGAINING AGREEMENT. The issue arose when an employer terminated his membership in an association. The court held that obligation to arbitrate remained, all the more so in view of a provision "that the employer's termination of membership in the association during the term of the collective agreement was not to relieve the employer of the obligations undertaken by it, including the obligation to arbitrate." *In re Freydberg*, N.Y.L.J., February 9, 1954, p. 7, Schreiber, J.

REFERENCE IN SALES CONTRACT TO TESTING OF MOISTURE CONTENT BY U. S. TESTING COMPANY NO BAR TO ARBITRATION UNDER AAA RULES. A sales contract for knitting yarns provided that claims relating to excessive moisture be made within ten days after receipt of shipment, and referred to the U.S. Testing Company, Inc., "whose test report thereon shall be conclusive." A court held that this clause does not bar an arbitration under AAA Rules "for any controversy or claim which may arise out of or relating to this contract or the breach thereof." The timeliness of the claim and the weight given to the reports of the testing are matters "for the determination of the arbitrator (*Matter of Wilkins,* 169 N.Y. 494)," said the court in granting a cross-motion to compel arbitration. *Matter of Allen Knitting Mills, Inc.,* N.Y.L.J., February 16, 1954, p. 7, McNally, J.

DISPUTE OVER TIME LIMIT FOR DEMANDING ARBITRATION IS ARBITRABLE. An arbitration panel was empowered in a collective bargaining agreement to "rule on all disputes pertaining to the interpretation or application of this agreement" within thirty days following the decision on the grievance at the meeting between the Shop Committee and the Management Representatives. Special Term considered the demand for arbitration by the union not timely and held the company justified in its refusal to arbitrate. The union contended that the events which start the time limit running had never occurred. The App. Div. (Fourth Dept.), in reversing, unanimously ordered the parties to arbitrate since the effect of the alleged waiver, "being a matter 'subsequent to the making of the contract . . . lies exclusively within the jurisdiction of the arbitrators.' (*Lipman v. Haeuser Shellac Co.,* 289 N.Y. 76, 80; *Kahn v. National City Bank,* 284 N.Y. 515). . . . [Special Term] having found that respondent *had* refused to arbitrate, it was only necessary to decide that petitioner's demand was bona fide, or at least not frivolous or unconscionable. (*General Elec. Co. v. United Elec. Workers,* 300 N.Y. 262; *Wenger & Co. v. Propper Silk Hosiery Mills,* 239 N.Y. 199.) The question of performance with the terms of the agreement goes to the merits and, particularly in this instance, requires an interpretation of the arbitration agreement; these matters 'the parties have consented to have decided by the arbitral tribunal.' (*Lipman v. Haeuser Shellac Co., supra,* p. 81.). . . . That is not true in the application before us, where there is a question which must be conceded to be one about which reasonable men may differ. We cannot say there is nothing for the arbitrator to decide. (Cf. *International Assn. of Machinists v. Cutler-Hammer, Inc.,* 297 N.Y. 519.)" *Local Union 516, Inspection Unit, UAW-CIO v. Bell Aircraft Corp.,* 283 A.D. 180, 127 N.Y.S. 2d 166.

ALLEGATION OF FRAUD REJECTED AFTER EXPIRATION OF THREE MONTH TIME LIMIT. A discharged employee sued the company and union for damages growing out of his discharge. An arbitration award had upheld the discharge but the employee charged the company and union with conspiring to delay arbitration and with failure to properly present his case. The Appellate Division (Third Dept.) considered whether the employee was in fact a party to the arbitration by virtue of his membership in the union, "since the union is an unincorporated association and the interested members of the union may be regarded as parties to the proceeding brought

in the name of the union." A final conclusion, however, had not been reached by the Court because the statutory remedy of sec. 1462 C.P.A. (motion to vacate within three months) was not observed. Said the court: "If the employee's substantive right as an individual is recognized, there is readily available an adequate statutory remedy, to protect that right. The statutory remedy [of sec. 1462 C.P.A.] is, of course, exclusive and must be exercised in the manner and within the time prescribed by statute. Upon this view of the case, the plaintiff should have intervened in the arbitration proceeding and should have moved to vacate the award within three months after the filing of the award. He had no right to bring a suit in equity to attack the award long after the expiration of the three month period." A majority decision therefore dismissed the complaint for insufficiency on its face, stating: "The only remedy the plaintiff can possibly have is an action for damages against his union." *Donato v. American Locomotive Co.*, 127 N.Y.S. 2d 709. (Cp. the article by Professor Arthur Lenhoff in Arb. J. 1954 p. 3.)

GRIEVANCE COMMITTEE MAY NOT DEMAND ARBITRATION WHERE ARBITRATION CLAUSE STATES THAT ARBITRATION MAY BE DEMANDED BY ENGINEERS ASSOCIATION. An arbitration was enjoined on the ground, among others, that the demand for arbitration was improperly made by the chairman of the union's grievance committee instead of by the president or treasurer of the union. Said the court: "Arbitration is a special proceeding (sec. 1459, C.P.A.) commenced by service of a demand for arbitration (*Shine's Restaurant v. Waiters &c*, 113 N.Y.S. 2d 315, 317; *John A. Johnson & Son v. Carroll*, 91 N.Y.S. 2d 692, 694). Under the provisions of section 12 of the General Association Law a special proceeding must be maintained by the president or treasurer of an unincorporated association. The requirements of section 12 apply to arbitration which, as previously observed, constitutes a special proceeding (*Matter of Solomon*, Mr. Justice Botein, N.Y.L.J., February 5, 1951, p. 438). Although the provisions of the collective agreement authorize various steps in the procedure for the settlement of grievances to be conducted by the union's grievance committee that agreement goes on to provide that 'In the event that the *Association* does not accept the Employer's answer, it shall . . . notify the Employer of its intention to submit the same for arbitration. It is thus clear that the demand for arbitration under the agreement is to be made by the association rather than by its grievance committee." *Hall v. Sperry Gyroscope Co.*, N.Y.L.J., January 28, 1954, p. 7, Greenberg, J.; to the same effect: *Local 450, International Union of Electrical, Radio & Machine Workers, C.I.O. v. Sperry Gyroscope Co.*, N.Y.L.J., March 12, 1954, p. 7, McNally, J.

ARBITRATOR'S TOTAL DENIAL OF CLAIM WAS WITHIN HIS AUTHORITY WHEN SUBMISSION PERMITTED DETERMINATION OF PROPER FEE. A doctor's claim of $518.40 against an employer as a reasonable value for medical services rendered to an employee in connection with an industrial accident falling within the purview of the Workmen's Compensation Law, was submitted to the determination of three arbitrators. The employer disputed the entire claim and also alleged (in the reasons of notice of objections under sec. 13g of the Workmen's Compensation Law) that the doctor was entitled to only $3 per office visit rather than the $5 claimed.

The award which dismissed the claim was challenged inasmuch as the arbitrators were limited to deciding either that the doctor was entitled to $5 or $3 for office visits, but had no jurisdiction to decide that he was not entitled to anything whatsoever. The court held the disposition of the arbitrators was not in excess of their powers to consider the employer's liability to the doctor for any or all of his bill. The court said that the situation would seem "to be analogous with the filing of a general denial in any suit together with specific affirmative defenses; the general denial raises every issue basic to the controversy, and its force and effect is not destroyed by the addition thereto of specific affirmative defenses more limited in their application. Furthermore, it is axiomatic that a competent tribunal need not determine an issue properly before it upon the specific grounds expressly adverted to by the defense." *Harnick v. Buffalo Brake Beam-Acme Steel & Malleable Iron Works,* 127 N.Y.S. 2d 308.

DEMAND FOR ITEMIZED STATEMENT OF CONTROVERSY REJECTED BY COURT DURING PROCEEDING TO COMPEL ARBITRATION. Said the court: "The only authority of this court is under section 1450 of the Civil Practice Act, 'to make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission.' The contract here is silent on this aspect and the court is without authority to supplement the contract." *Matter of Glasser,* N.Y.L.J., November 12, 1953, p. 1074, Gallagher, J.

DELAY IN ASSERTING "UNTIMELINESS" OF ARBITRATION UNTIL AFTER TRIAL OF PRELIMINARY ISSUE CONSTITUTES WAIVER. The respondent by going to trial on the issue of partial shipment "without arguing the belatedness of the petitioner's demand for arbitration must be deemed to have waived the point, whatever its merit." *Haddad v. Fontana-Hollywood Corp.,* N.Y.L.J., February 26, 1954, p. 8, Hofstadter, J.

INDIVIDUAL EMPLOYEE MAY DEMAND ARBITRATION WHEN UNION REFUSES TO DO SO IN HIS BEHALF. A union refused to demand arbitration on behalf of a laid-off employee who alleged violation of the seniority clause of a collective bargaining agreement. The court stayed an action instituted by the employee referring the employee to his right to arbitrate because, as a principal he "has the right to enforce the contract made by his agent upon the failure of his agent to act on his behalf." *Household Fuel Corporation v. Nilsson,* N.Y.L.J., January 8, 1954, p. 12.

PARTNERSHIP DISSOLUTION DISPUTE WAS NOT ARBITRABLE WHERE AGREEMENT TO ARBITRATE WAS LIMITED TO DISPUTE OVER BALANCE SHEET. Court refused to stay an action to recover damages for alleged false balance sheet. Said the court: "The parties did not agree to submit all issues to the arbitrator but only such items as were disputed in the balance sheet. . . . The effect [of compelling arbitration] would be that the court would require arbitration of that which was not within the contemplation of the parties (*Metro Plan, Inc. v. Miscione,* 257 App. Div. 652)." The court further observed that the Court of Appeals in *Matter of*

Behrens, 296 N.Y. 172, and in *Cheney Bros. v. Joroco Dresses, Inc.,* 245 N.Y. 375, left undetermined whether the claim of fraudulent inducement of a contract providing for arbitration "was cognizable by the court on the motion to compel arbitration, rather than by the arbitrators." *Greenspan v. Greenspan,* N.Y.L.J., February 15, 1954, p. 12, Brenner, J.

IV. THE ARBITRATOR

COURT DIRECTS ARBITRATOR TO SETTLE CASE "FINALLY AND CONCLUSIVELY." A majority of arbitrators, unable to reach a decision, made an award referring the matter back to the Jurisdictional Court. This award was vacated, the court saying: "An award must be certain and should be so expressed that the matters in dispute have been finally and conclusively settled (*Hiscock v. Harris,* 74 N.Y. 108; *Perkins v. Giles,* 50 N.Y. 228): 'The very essence of awards is certainty' and 'an award totally wanting in this essential particular is, in effect, no award at all,'—'for the object of parties in submitting their disputes to arbitration, is to make an end of litigation' (5 C.J., pp. 148-149, sec. 358, and cases cited). Arbitration is the antithesis of litigation. The arbitrators here have lost sight of the purpose of arbitration and the function of the arbitrators, as is very evident from the nature of their so-called award, and it cannot be accepted and is rejected." *Velveray Corp. v. Simon,* N.Y.L.J., March 17, 1954, p. 7, Eder, J.

ARBITRATOR WHO AGREES TO ACCEPT POST-HEARING STATEMENT MAY NOT ISSUE AWARD WITHOUT RECEIVING THE STATEMENT UNLESS PARTIES ARE NOTIFIED. An arbitrator agreed to receive a statement of an individual corroborating the employer's contention, and to issue a subpoena requiring the individual to testify if no such statement was furnished. Said the court: "The arbitrator should not have made his decision without informing the employer that he had not received a statement from Ballon and without issuing a subpoena for Ballon. The employer should not be foreclosed from a reasonable opportunity to present Ballon's statement." The matter was therefore remitted to the arbitrator for the receipt of the statement and further action thereon. *Excel Pharmacal Co. v. Local 815, International Brotherhood of Teamsters,* N.Y.L.J., February 17, 1954, p. 7, Schreiber, J.

REJECTION OF INCOMPETENT AND INADMISSIBLE EVIDENCE OF ONE PARTY DOES NOT BAR CONFIRMATION OF ARBITRATOR'S AWARD BASED ON OTHER PARTY'S EVIDENCE. Where the evidence was "clearly inadmissible in a court of law," the court said, accepting proof from only one party does not constitute "evident partiality" on the part of the arbitrator. "Whatever the basis for such ruling may have been, whether on the ground that it was not pertinent and material, in their view, to the controversy or on any other ground falling short of prejudicial misconduct, it is not a proper subject of inquiry on a motion to confirm. In any event, the mere fact that they did allow in evidence testimony offered by petitioner which respondent is able to show was also legally inadmissible, does not in itself constitute proof of 'evident partiality.'" *Sidella, Inc. v. Erber,* N.Y.L.J., March 4, 1954, p. 6, Eder, J.

REFUSAL OF THIRD ARBITRATOR TO PARTICIPATE IN AWARD NO BAR TO CONFIRMATION OF AWARD OF OTHER TWO. A third arbitrator who had attended not only all meetings where evidence and testimony were presented, but also the deliberation of the two other arbitrators, refused further to join in award. The two remaining arbitrators reached their final decision and made their award. Said the court, in confirming the award: "Such a course of action is not an irregularity or misconduct on the part of the majority of the arbitrators as to entitle the respondent to a vacatur." *Jos. Sultan & Sons, Inc. v. Art Novelty Linen Manufacturers,* N.Y.L.J., March 3, 1954, p. 8, McNally, J.

V. ARBITRATION PROCEEDINGS

REFUSAL TO ACCEPT POST-HEARING BRIEF NO BAR TO CONFIRMATION OF AWARD. An arbitrator refused to accept post-hearing briefs after the parties had agreed at the hearing that the arbitrator should rule on the question of filing such briefs and agreed to be bound by the ruling. Though the refusal was based on the erroneous reason that under the submission he was not permitted to accept post-hearing briefs, such refusal made in good faith does not constitute misconduct which would warrant vacating the award at common law or under the Pennsylvania Arbitration Statute of 1927, if applicable to collective bargaining agreements. The court made the following general comments: "It is not at all unusual—indeed it happens every day in courts of law in every state of the Union—that judges decline to accept post-hearing briefs and make an immediate decision. We have never heard of any charge of misconduct made because of the refusal to accept post-hearing briefs. The Pennsylvania arbitration statute does not make such action 'misconduct.'" *Technical and Clerical Employees, American Bridge Division of Ambridge Plant v. United States Steel Company,* 22 Labor Arb. 62 (Pennsylvania Court of Common Pleas, Allegheny County, February 11, 1954, Ellenbogen, J.

AWARD UPSET FOR ARBITRATORS' FAILURE TO ACCEPT TESTIMONY OF EXPERTS. Inspection of samples of Japanese shrimp by arbitrators between the second and third hearings at which Japanese experts were present but were not allowed to testify was considered misconduct within the meaning of sec. 1462 C.P.A. and an award was therefore not confirmed. *Perry H. Chipurnoi, Inc. v. Tobu Boeki K. K.,* N.Y.L.J., January 26, 1954, p. 8, Greenberg, J.

AWARD UPSET FOR ARBITRATOR'S ACCEPTANCE OF AFFIDAVIT WITHOUT PRIOR NOTICE TO OBJECTING PARTY. Acceptance of an affidavit and its consideration by the arbitrator without prior notice to the objecting party nullified the proceedings. Court directed arbitration before another arbitrator. *Astra Trading Corp. v. Samuel Barotz & Co., Inc.,* N.Y.L.J., February 23, 1954, p. 8, Parella, J.

COSTS OF ARBITRATION MAY BE PROPERLY DETERMINED IN AN ARBITRATION AWARD. (sec. 1457 C.P.A.). *Tanenbaum Textile Co., Inc. v. Hy Perlman & Co.,* N.Y.L.J., January 22, 1954, p. 7, Nathan, J.

VI. THE AWARD

AWARD WILL NOT BE SET ASIDE FOR ERROR OF LAW "UNLESS THE ERROR APPEARS ON THE FACE OF THE AWARD." In a contract for the construction of a machine shop in Los Angeles, arbitration was provided for the settlement of "all questions as to the rights and obligations arising under the terms of the contract, the plans and specifications." In confirming an award the court made this general statement: "Every reasonable intendment will be indulged to give effect to arbitration proceedings. An award made upon an unqualified submission will not be set aside on the ground that it is contrary to law unless the error appears on the face of the award and causes substantial injustice. *Utah Construction Co. v. Western Pacific R. Co.*, 174 Cal. 156, 159, 162 P. 631; *Popcorn Equipment Co. v. Page*, 92 Cal. App. 2d 448, 451, 207 P. 2d 647. The award of the arbitrators is sufficient if it is clear and precise and gives the result of the accounts between the parties without mentioning the process by which the result was reached. *Carsley v. Lindsay*, 14 Cal. 390, 394; *Popcorn Equipment Co. v. Page, supra.* The merits of the controversy between the parties, the nature and sufficiency of the evidence, and the credibility and good faith of the parties, in the absence of corruption, fraud, or undue means in obtaining an award are not matters for judicial review. *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal. 2d 228, 233, 238, 174 P. 2d 441." *Sampson Motors, Inc. v. Roland*, 263 P. 2d 445 (Cal. App. November 24, 1953, Moorse, P. J.).

TIME LIMIT FOR SEEKING COURT CONFIRMATION OF AWARD BEGINS WHEN AWARD IS SIGNED. The one-year period for making application for confirmation of an award, as provided in sec. 298.09 Wisconsin Statutes 1951, commences when the award is signed by the arbitrators. When no motion to confirm has been made within such period, "the stipulation to arbitrate and the entire arbitration proceedings are a nullity," said the Supreme Court of Wisconsin, reversing 264 Wisc. 353, 59 N.W. 2d 798 (digested in Arb. J. 1953 p. 151). *Pick Industries, Inc. v. Gebhard-Berghammer, Inc.*, 60 N.W. 2d 254 (1953), Fritz, Chief J.

WAGE AWARD VACATED IN ABSENCE OF WRITTEN CONTRACT OR SUBMISSION. The employers' association, on October 23, 1953, agreed to a 15% increase in wages to be effective November 2, 1953. On October 16, 1954, an individual employer had resigned from the association. The union demanded arbitration against the employer on October 30, 1954, which the employer resisted. An award granting a 15 percent increase was rendered without participation of the employer. The award was vacated on the ground that there was no written contract between the union and the company at the time arbitration was demanded and because the agreement with the association (assuming the individual employer was still bound by it) did not contain a provision for arbitration of wages. *Stenzor (Los Angeles Cloak Joint Board of International Ladies Garment Workers' Union) v. Leon (Mademoiselle Modes of California)*, 21 Labor Arb. 816 (Cal. Super. Ct., Los Angeles County, January 22, 1954, Praeger, J.).

SHORT TIME LIMIT WITHIN WHICH AWARD MUST BE RENDERED IS NO BAR TO CONFIRMATION OF AWARD. An award was to be rendered "within five days after the third arbitrator shall have been appointed." In refuting the claim that such provision is invalid as "unworkable," the court said: "The parties themselves have chosen by their agreement to limit the time within which the award may be made (Civil Practice Act, sec. 1460). This is consistent with one of the principal purposes of arbitration which is to reach a speedy final result and to avoid protracted litigation (*Bond v. Shubert,* 265 App. Div. 484, aff'd 290 N.Y. 901). Having agreed upon this short period of time in which the award may be made, that provision is 'instinct with an obligation, imperfectly expressed' on the part of *both parties* to co-operate in making that possible (*Wood v. Duff-Gordon,* 22 N.Y. 88, 91; 25 Cornell Law Quarterly 615, cited with approval in *Price v. Spielman Motor Sales Co., Inc.,* 261 App. Div. 626, 628)." *Joseph F. Mittelman Corp'n v. Murray L. Spies Corp'n,* N.Y.L.J., March 10, 1954, p. 12, Colden, J.

ENFORCEMENT OF AWARD UNDER COMMON LAW PERMITTED AFTER FAILURE TO OBTAIN CONFIRMATION UNDER ARBITRATION LAW WITHIN TIME LIMIT. The union's failure to apply for confirmation of an award within the one-year period of sec. 1461 C.P.A. does not prevent the union from a common law enforcement of the award providing for payment of minimum wage rates, since the collective bargaining agreement did not provide for arbitration solely under the New York Statute (as in *Sanford Laundry Company, Inc. v. Simon,* 285 N.Y. 488; see sec. 1469 C.P.A.). As to such common law remedies, the court referred to cases of other jurisdictions: *Hackney v. Adam,* 200 North Dakota 130, and *Beall v. Board of Trade of Kansas City,* 164 Missouri App. 186. *Jones v. Johnson & Sons, Inc.,* N.Y.L.J., March 9, 1954, p. 11, Cohen, J.

AWARD VACATED FOR ARBITRATOR'S EXCEEDING OF AUTHORITY BY DIRECTING VACATION BENEFITS AMOUNTING TO "ALTERING" OF CONTRACT. Under a collective bargaining agreement of August 1, 1950 with the Hosiery Workers Association of South Jersey, an independent union, employees were to be given vacation credit for the time they had been employed by the previous operator of the plant. A later collective bargaining agreement of September 30, 1952, with another union omitted any provision for credit for employment by the previous operator of the plant. Certain employees claimed to be entitled to two weeks' vacation pay as though they had been in the employ of the company for five years or more, which the company refused since the later agreement did not provide for credit for previous employment at the plant. That agreement provided for arbitration of disputes before a designated impartial chairman "on the interpretation, construction or application of the terms of this agreement," qualifying the arbitrator's authority by prohibiting him from altering, modifying or changing any of the terms. The award, in favor of the employees, was attacked as not justified under the contract. The court stated that the union's claim was based on the provision contained in the former agreement, but omitted from the existing contract, and that therefore the claim did not arise out of the contract. The court stated that ordinarily arbitration would not

be directed as to matters clearly omitted from the contract, referring to *Machine Printers, Beneficial Ass'n of U.S. v. Merrill,* 12 N.J. Super. 26, 78 A. 2d 834 (1951), and *Newark Milk & Cream Co. v. Local 680,* 12 N.J. Super. 36, 78 A. 2d 839. The court added, however, that "the plaintiff voluntarily submitted to arbitration and participated in the hearings, and the agreement provided that the parties were to be bound and abide by the decision of the impartial chairman. Arbitration proceedings are favored by the courts. Every intendment is indulged in favor of the award and generally the award would be sustained even though the arbitrator erred as to law or fact." However, this general rule is subject to qualification whenever the arbitrator intended to decide according to law and his mistake of law appears on the face of the award. The award, in the form of an opinion, showed on its face that the arbitrator intended to construe the contract in accordance "with the well established legal rule of contract interpretation." In vacating the award the Superior Court said: "The arbitrator in the instant case, both under the applicable rule of law and under the expressed terms of the contract, had no right to 'alter, modify or change' the terms of the written agreement. The omission of the provision for credit for previous employment in the plant, which had been included in the first contract, is significant. The provision was either intentionally eliminated or omitted as the result of mistake. If intentional, there could be no basis for the award. If it was the result of mistake, the proper course for the defendant to have pursued would have been to apply for reformation of the contract in the appropriate forum." *Collingswood Hosiery Mills, Inc. v. American Federation of Hosiery Workers,* 101 A. 2d 372.

ARBITRATOR'S REINSTATEMENT OF EMPLOYEE DISCHARGED FOR ALLEGED EMPLOYMENT APPLICATION MISREPRESENTATION AND COMMUNIST AFFILIATIONS UPHELD BY COURT ON SHOWING THAT REAL REASON FOR DISCHARGE WAS UNION ACTIVITIES. The discharge of an employee for misrepresentation in her employment application and for alleged communist affiliation was not sustained in an award. The arbitrators unanimously found that her discharge was based on her union activities and moreover that in view of knowledge of the alleged facts by the company for two and one-half years the latter had waived its right to discharge. In affirming a judgment which had confirmed the award the California District Court of Appeal considered the findings of the arbitrators conclusive upon the court, the findings of waiver and of discharge for union activities being findings on questions of fact, referring to the recent case of *Crofoot v. Blair Holdings Corp.,* 119 Cal. App. 2d 156 (digested in Arb. J. 1953 p. 210). The court did not decide the question whether employment of a dedicated communist is against public policy, inasmuch as "the arbitrators have found that membership in the communist party was not the real reason for the discharge, but that the real reason for the discharge was to interfere with the lawful labor activities of the union. The arbitrators also found that this was a direct violation of the collective bargaining agreement. Thus the appellant, who it has been found has unlawfully violated its contract and the public policy announced in section 923 of the Labor Code, seeks to support its unlawful action by asserting that the employee was a communist, which was one of the reasons set forth in the letter

of discharge, but which it has been found, was not the real reason at all. Certainly it is implicit in the collective bargaining agreement that the 'just cause' for the discharge must be not only stated to the employee, but the stated reason must be the real reason for the discharge. . . . What was the real reason for the discharge was obviously a question of fact for the arbitrators and their findings on this issue are binding and conclusive on the courts." *Black v. Cutter Laboratories,* 122 Advance Cal. App. Reports 956 (First Dist., January 28, 1954, Peters, P. J.).

AWARD RENDERED "ON THE BASIS OF ALL THE EVIDENCE" IS CONFIRMED EVEN WHERE AN ARBITRATOR'S WRITTEN OPINION, SEPARATED FROM THE AWARD, LACKS "TECHNICAL PRECISION." An award of an arbitrator who had separated his opinion from the award, determined the issue "on the basis of all of the evidence in the above matter." The court in confirming the award did not consider the opinion in which the arbitrator pointed out the ambiguities or uncertainties or omissions in the contract itself as controlling. There was no case presented to the court which would indicate that an opinion—not an award—in excess of power of an arbitrator was the basis for vacating an award. The court observed that the arbitrator said in his award, which alone controls, "on the basis of the evidence" and not "on the basis of the opinion I have just pronounced." In confirming the award, the court stated: "The thing we must look at is the face of the award itself, and see whether it is in excess of the powers of the arbitrator. If we do that, we find that it is exactly the language of the submission, and it is entirely consistent with the submission." The court's decision expressed the following advice to arbitrators: "Although technical precision is not required in an award of arbitrators (*Dugan v. Phillips* (1926) 77 Cal. App. 268), I would urgently suggest that arbitrators follow the form of award provided by the American Arbitration Association. In the event they feel impelled by some uncontrollable urge, literary fluency, good conscience, or mere garrulousness to express themselves about a case they have tried, the opinion should be a separate document and not part of the award itself. Thus it would be comparable to a trial court's opinions, which appellate courts have consistently held are not controlling in the event they are in conflict in any respect with Findings of Fact and Conclusions of Law." *Loew's, Inc. v. Max Krug,* Super. Ct. of the State of California, In and For the County of Los Angeles, Santa Monica, Dept. A No. 609, 196, December 2, 1953, Mosk, J.

AN AWARD DOES NOT BECOME INVALID BY CITING WAGE RATES FROM A DOCUMENT WITHOUT INCORPORATING THE DOCUMENT IN THE AWARD. COURT ALTERS AWARD TO THE EXTENT OF CHANGING "WITHOUT UNDUE DELAY" TO READ "WITHIN 90 DAYS." A collective bargaining agreement with the Drive In and Restaurant Owners Association of Southern California, to which a Wage Section was annexed, provided for the reopening of that Schedule for negotiations and for arbitration under AAA Rules if the negotiations "cannot be resolved by the parties within a reasonable time." On a demand for a retroactive increase of 12 percent, an agreement was reached with two drive-in restaurants, a copy of which was introduced in evidence as Union exhibit 2 at the

arbitration hearings against the third drive-in restaurant. The arbitrator awarded the same increase in pay to the employees of the third restaurant, as was agreed by the two other restaurants, by reference to said Union exhibit 2, without setting forth in nor annexing a copy thereof to the award. The latter was challenged, inasmuch as it referred to another document which was not incorporated in the award. The court refuted this challenge, saying: "The court holds that this is not a valid ground of objection. 'That is certain which can be made certain.' (See Civil Code 3538)." The award was further challenged because it provided for the payment "without undue delay." The court agreed with this contention and modified the award, in affirming it, to the effect that all back payments which had become due and payable under the award be made "within ninety days after the date of the order confirming the award, instead of 'without undue delay' as provided in the award." *Los Angeles Local Joint Executive Board of Culinary Workers and Bartenders, A. F. of L. v. Stan's Drive-Ins, Inc.*, Superior Court of the State of California In and For the County of Los Angeles, No. 620, 746, January 11, 1954, Praeger, J.

PRO-RATA VACATION AWARD WITHIN SCOPE OF ARBITRATION AS A "CONTRACT INTERPRETATION." Pro-rata vacation pay was awarded employees whose employment was terminated on January 14, 1952 when the company ceased all operations at a plant. The award of the arbitrator was challenged on the ground that the collective bargaining agreement, though expressly providing for arbitration of grievances concerning wages, gave the arbitrator no authority "to change in any respect any provision of this Agreement nor add to, delete or modify any of its provisions" and that only those employees were entitled to vacation pay who were employees on the first of June of each year. The court found the contract somewhat ambiguous in this respect and said: "In making his award the arbitrator construed the contract, as it was his right and duty to do. He added nothing to the agreement. Instead, he based his conclusions on a permissible construction of the written instrument. . . . Homespun honesty and simple justice demand that they [employees] should receive that part of their vacation pay they had earned when their employment was terminated. The arbitrator, under a permissible interpretation of the contract, has determined that they are entitled thereto under the collective bargaining agreement. While it is not our prerogative to review or reverse his interpretation, so long as it is interpretation and not interpolation of provisions not contained in the contract, we are inclined to concur in his conclusion." The Supreme Court of North Carolina further said, in referring to *Thomasville Chair Co. v. United Furniture Workers*, 22 N.C. 46, 62 S.E. 2d 535, 24 A.L.R. 2d 747: "An arbitration is an extrajudicial proceeding and the arbitrator is not bound by the rules of procedure and evidence which prevail in a court of law. When the dispute submitted to him grows out of a written contract, and settlement of the controversy requires an interpretation of that contract, interpretation thereof is within his authority." *Calvine Cotton Mills, Inc. v. Textile Workers Union of America*, 79 S.E. 2d 181.

AN EDITORIAL

(*Continued from Page* 1)

lated matters would have been beyond the scope and facilities of the Association. It will also be noted that the Association's thousands of labor-management awards and opinions are not covered by the new classification system, nor are they included in the Library or its published bibliography. It is planned to undertake a separate study of AAA and other arbitration awards and opinions and to publish separate analyses and indexes as soon as funds become available.

Within the seven major groups, titles were arranged alphabetically by author. The complete listing was then numbered consecutively and a subject-index was constructed to provide easy reference. This catalogue, the first comprehensive bibliography on arbitration to be published in the United States, represents only works in the Lucius Eastman Arbitration Library. With the cooperation of librarians and of those interested in the arbitration process, many new titles will be added to the Library and will be listed in later editions.

The AAA is a voluntary, non-profit membership corporation and contributions of books and papers to improve the library are earnestly solicited. It is hoped that the establishment of the Lucius Eastman Arbitration Library will do much to bring about a better understanding of the arbitration process and that its increasing use as a means of settling controversy will contribute, as it has in the past, to building of goodwill throughout the world.

FORM OF BEQUEST

I give, devise and bequeath to the American Arbitration Association, Inc. in New York .....

.....

.....

(Insert the amount of money bequeathed, or a description either of specific personal or real property, or both, given, or if it be the residue of an estate, state the fact.)

NOTE: *All contributions to AAA by gift or membership enrollment are tax free.*